

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL,

ON APPEAL FROM THE SUPERIOR AND COUNTY
COURTS—APPEALS IN INSOLVENCY—
AND ELECTION CASES,

BY

J. STEWART TUPPER,

BARRISTER-AT-LAW AND REPORTER TO THE COURT.

CHRISTOPHER ROBINSON, Q.C.,

EDITOR.

VOL. III.

CONTAINING THE CASES DETERMINED
FROM MAY 9TH, 1878, TO FEBRUARY 3RD, 1879.
WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS.

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J U D G E S
OF THE
COURT OF APPEAL
DURING THE PERIOD OF THESE REPORTS.

THE HON. THOMAS MOSS, C. J. A.
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ERRATUM.

In the third line of page 523 erase the word "view," and read, "I agree in the general result arrived at," &c.

REPORTS OF CASES

IN THE

COURT OF APPEAL.

EX PARTE GRIFFIN—IN RE RANKIN.

Insolvent Act, 1875, sec. 18—Setting aside attachment—Delay in moving—Partnership—Acceptance by new firm of old debt.

A writ of attachment issued against R. & Co. on an acceptance in the name of the firm given for a debt contracted before G. became a member thereof. A bill of exchange for this debt had been accepted in the firm's name after G. joined it, in consideration of which an extension of time was given, and it passed through the books, and was never repudiated by G. This acceptance matured after G. had retired from the firm, (which change, however, was not registered in compliance with R. S. O. ch. 123), and being unpaid, the acceptance upon which the writ of attachment issued was given. Seven weeks after the writ of attachment had been served upon him, G. moved to set it aside, accounting for his delay on the ground that the solicitor whom he had instructed to move had been called away by urgent business.

Held, affirming the judgment of the County Court Judge, without deciding whether such an application can be made after the five days prescribed by sec. 18 of the Insolvent Act of 1875, that the appeal could not be entertained, for that the delay was not sufficiently accounted for.

Held, also, that G. was clearly liable to the attaching creditors on this acceptance.

THIS was an appeal from a decision of the Judge of the County Court of the county of Hastings, sitting in insolvency, dismissing a petition to set aside a writ of attachment.

The firm of Miles E. Rankin & Co., against which the writ of attachment in question issued, was formed in March, 1875, and the appellant, Griffin, and a person named Tretz, were admitted as partners on the 1st November, 1876. In the interval between these two dates the goods were purchased, the price of which formed the original claim of the creditors who issued the writ of attachment. In March, 1877, these creditors drew a bill upon the firm of Miles E.

Rankin & Co., which was accepted by the partner whose duty it was to attend particularly to the financial business.

On the 1st May, 1877, an agreement for a dissolution of the firm was made, the appellant assigning his interest in the partnership to two of the other members. This change in the constitution of the firm was not registered in compliance with the Act of this Province, R. S. O. ch. 123, and on the 17th September, 1877, the bill having matured and being unpaid, the creditors, who had no notice whatever of the dissolution, agreed to draw by way of renewal upon the firm at one month. This bill was accepted in the name of the firm, and not having been paid, the writ of attachment was issued on the 5th of November. The affidavit, upon which the order for the writ was granted, simply proved the acceptance of the 17th September. The writ was served upon the appellant on the day on which it was issued, but his petition to set it aside was not presented until the 27th of December, being more than seven weeks after service. It was from the order dismissing a petition to set aside this writ, that the appeal was brought.

The cause was argued on the 26th February, 1878, before Moss, C. J. A., sitting in insolvency.

Wallbridge, Q. C., and *Fitzgerald*, Q. C., for the appellant.
F. Osler, for the respondent.

The arguments sufficiently appear in the judgment.

May 9th, 1878. Moss, C. J. A.—I have given this case repeated and anxious consideration. It is impossible to approach it without a feeling of commiseration for the appellant. A man of 65 years of age, who had been all his life a farmer, receives for \$2,400, the privilege of being admitted as a partner into a manufacturing firm, which there is every reason to believe was then tottering on the verge of insolvency. After an experience of some six months he retires, his capital being represented by an empty promise to pay, and his receipts from the firm

during his luckless connection with it being a cord or two of wood.

Now, some months after he had ceased to be a member in fact, he finds himself placed in insolvency upon a bill of exchange accepted in the name of the firm after the dissolution, in respect of a debt contracted before he had taken the important step of joining the concern.

It is urged that this acceptance was a fraud upon the appellant, who was not liable for this antecedent debt, but upon the materials before me I am unable to arrive at that conclusion. He did not, so far as the evidence shews, purchase a share in the assets of the old firm without regard to its liabilities. But even if by arrangement between his co-partners and himself they were to bear the burden of all antecedent debts, he clearly became liable to the attaching creditors. The bill was never repudiated by him; in consideration of its receipt, the creditors gave the valuable consideration of an extension of credit; it passed through the books of account of the firm in the ordinary course; and the appellant therefore became fixed with all the consequences of knowledge of its existence as an acceptance of the firm. The principles enunciated in *Rolfe v. Flower*, L. R. 1 P. C. 40, are upon the facts proved decisive against the appellant.

There are three grounds upon which mainly the appellant rests his claim to be relieved from the operation of the writ. He contends that at the time the acceptance was given he was not liable to be placed in insolvency, because he was not a trader, and that while the Provincial Act may enable the plaintiffs to recover from him in an action upon the bill, it cannot enlarge the scope of the Insolvency Act by making him a trader. Secondly, he contends that this was not a debt contracted while he was a member of the firm; and thirdly, that he was not liable even upon the first bill, because it was signed without his special authority. I have already disposed of the third point adversely to the appellant. The other two points raise questions of some nicety and difficulty, but it is only necessary to consider

them if a preliminary objection which was taken in the Court below is untenable.

The appellant is invoking the aid of the 18th section of the Act, and the objection is, that his petition was not presented within the prescribed period of five days, nor within a reasonable period afterwards. Under the former Acts it seems to have been settled that such a petition must have been presented within the prescribed period. A very satisfactory statement of the authorities may be seen in Mr. Clarke's exceedingly useful commentary on the present statute. Indeed it could hardly be otherwise, because the emphatically exclusive words, "and not afterwards," were there employed. These words, however, do not appear in the Act of 1875, and their omission raises the question whether the Court could not now, upon an adequate reason being shewn for the delay, entertain an application after the lapse of the period indicated by the section.

I understand that it has been held in Quebec that it is still obligatory to move within the statutory period, and my brother Burton seems to have entertained that opinion in *Carrier v. Allin*, 2 App. R. 15.

It is true, as now pointed out by the learned counsel for the appellant, that the point was not essential to the decision of that case, and the attention of my learned brother was perhaps not directed to the change in the language of the Legislature. Although I have not formed any decided opinion upon the question, I do not intend to cast any doubt upon the correctness of that view; I simply desire to reserve to myself full liberty to consider it, if in any other case its settlement becomes necessary. I may add, that as at present advised, it appears to me to be extremely difficult, if not impossible, to place any other construction upon the statute.

But even if it is not absolutely incumbent upon the alleged insolvent to move within the five days, I apprehend it is not open to doubt that appealing, as upon that hypothesis he must, to the discretion of the Court he is bound in some satisfactory manner to account for his delay. This

attempt the appellant has made, but, as I think, without success. His sole explanation is, that he instructed the solicitor then acting for him to take the necessary proceedings to set aside the attachment, but that this gentleman being called away by urgent business did not return until the day after the time had elapsed, when he informed the appellant that it was too late to move. What led to his receiving different advice, is not disclosed. During the seven succeeding weeks there was a meeting of creditors, an assignee and inspectors were appointed, and possession was taken of some at least of the assets, without a word of objection or remonstrance by the appellant. I am not informed of the grounds upon which the learned Judge declined to grant the prayer of the petition, but if it were on account of the delay and acquiescence of the petitioner, and the inadequacy of his excuse, I certainly could not say that he was wrong. Even if this were not the reason he gave, the argument resting upon this basis is not less forcible when used in support of his order.

I have the less hesitation in coming to this conclusion, because I perceive that it is really inflicting no substantial injury upon the appellant. It is to my mind beyond question that the Ontario Statute, R. S. O. ch. 123, makes the appellant liable to the attaching creditors in an action at law. They and those who occupy a similar position could recover judgments, and are undoubtedly creditors of all the persons placed in insolvency, including the appellant. In the insolvency proceedings no one can prove who is not a creditor of all these persons, including the appellant, or of the appellant individually, and the latter class will enjoy priority. Not a claim, therefore, can be realized out of his private estate, which could not have been made available against it in the shape of a judgment.

I abstain from expressing any opinion upon the question of whether the appellant's failure to present a petition within the proper period (and it is to be understood that I am proceeding upon that ground only, and not upon the

merits) precludes him from challenging the adjudication in any other form. The practical result of my decision is the same as if no petition had been presented. It is simply not entertained, because it comes too late.

The appeal must be dismissed, but it is not a case for ordering costs against the appellant.

Appeal dismissed.

BLASDELL V. BALDWIN ET AL.

Partition—Water mill privilege.

The plaintiff filed her bill for a partition of 200 acres of land on the river Ottawa and a water mill privilege appurtenant thereto. The property in question had been acquired by her and one A. H. as tenants in common, and A. H. had subsequently conveyed an undivided one-fifth of his portion to the four other defendants. The evidence shewed that in order to divide the water privilege very complicated structures would have to be made at heavy expense, and a large sum of money expended annually in maintaining them. It also appeared that the difficulties in carrying out the scheme would be very great.

Held, affirming the judgment of SPRAGGE, C., that it was the duty of the Court to consider the interests of all the defendants, and a partition could not be decreed without injuring them; but that even if the case were decided without reference to the interests of the defendants other than A. H., partition was under the circumstances rightly refused; and a sale of the water privilege, together with a sufficient quantity of land for the purpose, was ordered.

THIS was a partition suit.

The plaintiff's position was, that she and the defendant Baldwin, on the fifth of July, 1870, became co-tenants in fee simple of two hundred acres of land upon the Ottawa River, near the Little Chaudiere Falls, subject to a mortgage given to them for securing the unpaid balance of the purchase money, amounting to \$14,000. This principal sum had not become due at the date of the commencement

of the suit, but the gales of interest seemed to have been paid, although not without instances of default.

In March, 1874, the defendant Baldwin executed four several conveyances to the other defendants, each of an undivided one-fifth part of his estate in the lands and premises, by which his moiety had become divided in interest between four different parties.

The plaintiff in her bill alleged that there was in front of and appurtenant to the premises a water mill privilege near the Falls, and that before the conveyance she and Baldwin agreed that Baldwin should erect and maintain a large saw-mill in front of the premises, for the purpose of enhancing the value of the premises, and particularly with a view of laying out the land, or the greater portion thereof, in village lots, to be sold for their benefit, but that he had never built such a mill, although the plaintiff had at considerable expense cut a canal, by which the flow and force of the water was concentrated for the purpose of driving a mill.

The bill also referred to certain proceedings by the defendants in connection with sales of certain lots, which had been made for the benefit of all concerned, and to efforts used for producing an amicable settlement, which it is unnecessary to state. The prayer was for a partition of the premises and a division of the privilege.

The defendants did not in their pleading admit the agreement for the erection of a mill by Baldwin, and they submitted that owing to the peculiar position of the premises bounded by the Ottawa River, and the rights and privileges appurtenant thereto, and the peculiar value to each of them personally in the prosecution of the business of manufacturing lumber, the lands could not with justice to all parties in the suit be partitioned, but should be sold. They all alleged that a portion of the premises formed an island in the river, and that large improvements had been made upon the land with a view to the more perfect enjoyment of the water as a site for a saw-mill and for collecting and storing logs.

The decree directed the Master to enquire whether a sale or partition of the lands and premises, or a sale of part and partition of the remainder, would be more for the interest of all parties entitled to share therein, and in case that he found a sale thereof or of any part thereof would be more for their interests, appropriate directions were given as to the mode of carrying it out.

The Master held that it would be more for the interest of the parties entitled to share in the property to divide what was termed the water power into two portions—allotting to each a portion of the land—to partition to the plaintiff one-half of the water power with the land allotted thereto, and to sell the remaining water power and land as might be deemed advisable, and to distribute the proceeds according to the interests of the parties.

Upon appeal his Lordship, the Chancellor, directed a reference back to the Master to review his certificate and to carry out a sale of the water privilege, together with a quantity of adjacent land, sufficient for the purposes thereof. The plaintiff appealed.

The case was argued on the 5th March, 1878. (a)

J. O'Connor, Q. C., (*Bain* with him), for the appellant. In the consideration of the question before the Court, it is important to bear in mind that the appellant is entitled to half of the property, and that the interests of all the other respondents are only co-extensive with the appellant's; and inasmuch as the respondents, other than Baldwin, have acquired their interests under him, and are only entitled to a share in the moiety which originally belonged to him, it is submitted that any difficulty in dealing with the respondents' interests *inter se* should not be taken into consideration in dealing with the appellant's rights. Under the English Partition Act, 31 & 32 Vic. ch. 40, where a party holds a moiety of the estate, the right is given to him to say whether it shall be sold; but there is no such pro-

(a) *Present*.—MOSS, C. J. A., PATTERSON and MORRISON J J. A., and BLAKE, V. C.

vision in our Statute. The cases shew that at Common Law the Court could only have directed a partition. The power of sale being entirely the creation of the statute must be construed according to the strict words of the Act; and under section 25, of 32 Vic. ch. 33 O., the *onus* of proving that a partition cannot be made without prejudice, rests upon the person desiring a sale. The evidence, however, shews that the property can be partitioned by giving the appellant a moiety of the water privilege and of the land without prejudicing the interests of the respondents. The respondents do not pretend that their interests, so far as this property is concerned, would be prejudiced by a partition, but it is with regard to the enjoyment of other property in which the appellant is no way concerned, that it is alleged their interests would be injured. The scheme by which this partition is proposed to be carried out is practicable, and the mere fact that there are difficulties in the way, is no ground for refusing partition. They referred to *Pemberton v. Barnes*, L. R. 6 Ch. 687; *North v. Guinan*, Beatty, 344.

C. Moss for the respondents. The main object of the appellant and Baldwin in purchasing the lands in question was to lay it out in village lots to be sold for their benefit, and before the institution of this suit a large portion of the said lands had been laid out in village lots, some of which had been sold to purchasers. Under these circumstances, the respondents submit that the original understanding of the parties should be adhered to. It appears that it was not their intention to divide the water power, but to have only one mill, and thus enhance the surrounding property. A strong case must be made before the Court can depart from the original intention of the parties. The *onus* of shewing that the lands should be partitioned, is clearly on the appellants; but they have entirely failed to do so. The Master has found that a large outlay of money would be required to carry out the division proposed by him, and there is no fund out of which this expenditure could be provided for. But even if the money

could be commanded, there is no evidence to shew that it would increase the value of the property to any appreciable extent. Moreover, the partition sought by the appellant would not be a complete partition, but would involve the holding of certain portions of the property in common between the parties, and would probably lead to future litigation and determining of rights. The argument that the Court need not pay any attention to the interests of the respondents, other than Baldwin, who are equally interested in the moiety, is not supported by any authority ; and the contrary is the rule of the Court of Chancery. There can be no question that a partition of half would damp a sale of the other half, and seriously injure these respondents. The appellant can protect herself against any danger of loss through a sale of the water privilege and lands adjacent thereto by giving up the conduct of the sale, and thus becoming entitled to bid thereat on her own account, or by having a reserved bid fixed by the Master.

Bain in reply. The plaintiff cannot protect herself by having a reserved bid fixed, as in the event of the property not bringing the reserved bid, a lower reserved bid would be fixed.

May 30th, 1878. (a) Moss, C. J. A.—We do not think we can attach the slightest weight to the suggestion that the Master's opinion is of special value, either on account of his local knowledge or because he enjoyed the advantage of seeing the witnesses. We entertain no doubt that the learned Chancellor gave the plaintiff the full benefit of these considerations, and differed from the Master on grounds which remain unaffected by any peculiar advantages that officer possessed. There is no serious conflict of testimony upon the material elements of the controversy, and there seems to be no reason why a Judge should not be as competent as the Master to appreciate the local circumstances. Indeed, it may justly be

(a) *Present*.—MOSS, C. J. A., PATTERSON, and MORRISON, JJ. A., and BLAKE, V.C.

urged that this is in a special degree the kind of case in which great respect should be paid to the opinion of a Judge of such enlarged experience and great practical information.

The form of the decree seems to dispose of an argument that was strenuously pressed upon our attention. That argument is, that the Court is wholly to disregard the circumstance that the defendant Baldwin has made conveyances of portions of his estate and interest to the other defendants. The decree shews that in the view of the Court equity demands that the interest of all parties should, as far as possible, be considered.

That is the doctrine upon which the Court of Chancery in England proceeded when exercising its ancient jurisdiction, and we believe it has been the invariable rule in this Province.

Unless the learned Chancellor was prepared to depart from that rule we do not see how he could refuse to reverse the Master's finding. It is too obvious to need comment that the interest of an owner of an undivided one-tenth share is seriously imperilled by the course proposed to be followed by the Master. But even if we were to adopt the plaintiff's view, that the case is to be considered without reference to the individual interests of the defendants, and in precisely the same manner as if Baldwin alone were the owner of the other half, we are of opinion that the proper conclusion from the evidence is, that which has been drawn by the Chancellor.

The use of the term, "the partition of the water-power or privilege," is apt to lead to misconception and confusion. A division of this power cannot be made by drawing a line along the surface of the water in front of the premises, and giving each party the use of the water on opposite sides of this line. The valuable thing appurtenant to the lands which the Master proposes to divide, and to allot one-half to the plaintiff, is the force or power of the running water which is capable of being utilized for propelling machinery. In order to divide this force structures and arrangements of a more or less complicated nature must be made.

We think it is quite impossible upon the evidence to form any opinion upon the amount of cost and difficulty and embarrassment this might involve. Even the witnesses most favourable to the plaintiff wholly fail to convey any definite notion of the necessary expenditure, while it is admitted by all that enforceable regulations must be made before each party can be secured in the enjoyment of an equal right in the power.

It is not too much to say that to apportion one-half of the power to the plaintiff, and to offer the other half for sale, would be very like a complete sacrifice of the defendants' interests. A few citations from the evidence will we think, abundantly establish this position.

Taking the witnesses in the order in which their testimony appears in the appeal book, we have first Mr. Thomas Keefer, the well known civil engineer, who was called by the defendant Baldwin. He stated that a pier or wing dam had been built on the north side of the property, and that it would require an annual sum to be expended upon it to maintain the water power in its present condition. This would be a considerable charge, but he could not state the amount. But for the wing dam there would be no water power. He said that any person having the water power, which is created by that wing dam, would require the control of that water frontage; no independent rights could be conveyed of the water frontage; they would all be controlled or influenced by the state or effect of the wing dam.

I quote at length the remaining passages of his evidence: "Supposing it was proposed to divide the water power into two parts, the most economical manner would be to maintain the wing dam in common, divide the pond into equal areas by a boom, then to make two mill lots at the foot of it of equal average, both drawing from the same pond, and restricted not to draw more than half the flow of the pond each; that covers all with regard to that form of partition. There would be no difficulty in arranging that each party would use the same equal quantity of

water. The outside mill would require a right of way inland, passing the inner mill; this would be done under the partition. Supposing it was necessary to divide the water power entirely, the pond should be excavated to an equal depth and divided by a water tight pier longitudinally, which would act as a wing dam, a dam of sufficient strength to remain strong even if one of the channels were emptied of water."

"There ought, under the second scheme, to be a provision by which the persons holding the inner pond should contribute to the maintenance of the outside dam, which is subject to all the expense. The second scheme would require a large expenditure of money in having the pond excavated to equalize it, and depend upon a provision for the joint maintenance of the outer wing dam."

It has almost passed into a proverb that at the present day the triumphs of engineering science and skill are only limited by the money at command. Mr. Keefer's evidence points to the conclusion that by a sufficient expenditure and by providing proper arrangements a division is practicable. That is a proposition which no one will dispute; but the amount of the expenditure and the practical feasibility of the arrangements are not shewn. The nature of the arrangements to be made for securing an equal supply of water to each proprietor would depend upon the structures made for dividing the volumes of water or regulating its use; and I presume that the difficulty or impossibility of determining such details *a priori* accounts for the vagueness and generality of all the evidence.

Mr. Wise, another civil engineer, agreed with Mr. Keefer, except that he added, with reference to the second scheme, that provision would have to be made for the protection of the mills from the sudden action of the water in case the outer wing dam were carried away, but that this difficulty could be obviated by making the bulk head of sufficient strength.

He was not asked to give any estimate of expenditure, and entered into no details.

Erastus Bullis said that he had had experience as to the erection and running of water mills on the Ottawa: that he "never saw mills very much, but sufficient to know the manner in which water is supplied or divided, if occasion requires."

He thought the water from the pond could be so divided as to run mills for two separate parties at the head of water below. He could "not see any practical difficulty to prevent it being done; it could be done by boom or dam; a dam would be preferable."

He explained his views as follows: "My proposition to divide the pond would be to run a dam lengthwise, though to divide the pond evenly on the surface would not be an equal division of the water in the pond; if the water was divided as I suggest equally, the man having the outside part of the pond would have to keep up the wing dam; I don't know if it would be fair or equitable to make a partition so that the man on the outside would have to keep up the wing dam, which would have to be kept up as well as the dividing dam. To make an equal division there would have to be an equal division at the head of the pond where the water comes in; to make an equal division of the water at the head of the pond it would involve considerable expense. I cannot devise any means or method of dividing the pond without incurring expense to any party; to make the partition of the pond, so as to be used for mill purposes, would involve artificial constructions. I don't think that it would take a large expense to keep up the outside dam if properly built; if a stone dam were built it might not require an outlay of expense for ten or fifteen years, perhaps not then. I can't say what a stone dam would cost. I think it would cost \$6,000, but I don't know."

The evidence of the plaintiff's husband calls for no lengthened observation. He had had no practical experience in the construction of mills or water dams, and he could give no estimate of the cost of making the division he proposed.

Robert Sparks is a civil engineer, who has not had much experience in hydraulics, and who thinks that there is no practical difficulty in making the division of the water privilege, but that it would require a considerable outlay of money.

The evidence of Julius C. Blasdell does not appear to me to advance the plaintiff's case. He said that he did not see any advantage in dividing unless there was some object in view. That he didn't think it would make the water privilege any better or worse: that he would not think of making the centre dam, if he had owned it, unless he had an object in it: that it could be used more extensively, if undivided; and that he could not say whether it would or would not be more advantageous to keep it undivided.

Charles Esplin thought that the division could be made very cheaply, *if the parties were agreeable*, by a single boom, but that it would be better for all parties to make the division by the water tight pier or dam, making an equal division of the area of the pond. To build a centre light dam in the pond that would make an efficient division, would, he thought, cost from \$8,000 to \$10,000.

The evidence of Mr. Soare, civil engineer, seems to me to be composed of vague generalities. He could give no idea of the costs of "the partition dam," nor could he fix within \$4,000 or \$5,000 the cost of repairing the outside dam, the necessity of which is indisputable.

The next witness, Mr. Edward Perkins, does not contribute any new information of a specific kind.

Mr. William Kennedy, who is the superintendent of the Ottawa Water Works, and to whose established reputation as a hydraulic engineer it cannot be improper to refer, gave evidence, which seems to be full of significance. He said: "The water power and pond can be divided evenly by running crib work from the centre of the pond at the lower end, and continuing it through the centre to the centre of the upper end of the pond; it would be necessary in the first place to deepen the shore side of the pond, making the shore side of the pond of equal depth with the portion on

the other side of the proposed crib work; a division by boom or crib work, without touching the bottom, would not be a proper division of the water power; the entrance to the pond above the commencing point of the crib work should be deepened also; the party getting the outer portion of the water power would require a right of way across the inner portion. "It is a mere question of the expenditure of money, of which I have not made any estimate and cannot say." He added that the value of the water power would not be improved by a division into two parts; that it is more valuable in the whole.

Mr. George Brophy, civil engineer, agreed with this evidence, which he heard given. He could not give an estimate within \$2,000 of what the proposed pier would cost.

With the exception of Messrs. Keefer and Wise, all these witnesses were called on behalf of the plaintiff. Upon such testimony it appears to me to be impossible to hold that the plaintiff has established that it would be for the interest of all parties, or of any party, that the Master's scheme should be adopted.

It was specially incumbent upon the plaintiff to give satisfactory proof, because the scheme involves a total departure from the original purpose for which, according to her allegation, the property was acquired. At the time of the original purchase no division of the water power was in contemplation. She has expressly alleged that the agreement was that Baldwin would erect and maintain a large saw-mill for the purpose of improving the value of the land, which it was intended to sell in village lots.

The correctness of the decision of the learned Chancellor becomes still more apparent, when we attempt to realize any mode of carrying into effect the scheme proposed by the Master. From the wording of the certificate I infer that it is intended to make an actual division of the privilege in one of the ways suggested by the witnesses before offering for sale the half not allotted to the plaintiff. This, indeed, would seem indispensable. Merely to allot

a portion of the land to the plaintiff, and to give her in so many words one half of the water privilege, and to offer for sale another portion of land with one half of the privilege would be vain and futile. It would afford no solution of the controversey respecting the power, for it would, as to it, simply place the purchaser in the position now occupied by the defendants, that of a tenancy in common. Nor does it seem probable that any one would purchase on the chance of being able to make satisfactory arrangements with the plaintiff.

The plaintiff might indeed purchase, for she would then become the owner of the whole privilege, but the defendants could scarcely compete with her in a contest, in which success would leave them just where they are. That mode of proceeding may therefore be rejected.

Then if an actual division ought to be made before offering the half for sale, by what authority, in what manner, and from what resources is it to be made?

It is clear that work must be done, and a plan devised imposing correlative obligations, and conferring rights and powers, of a kind as yet undefined, upon the plaintiff and the purchaser.

Is the Master to fix the character, extent, and costs of the necessary works? I know of no authority he possesses to take such action. If he directs a certain amount of repairs to be made upon the wing dam, and all agree that its reparation is indispensable, is there to be no appeal to the Court upon the subject at the instance of either party who may think some of the items unnecessary or injudicious? Who is to fix upon the proper expenditure for and mode of construction of the centre dam, the bulkheads, or whatever other appliances may be necessary to effect the division? With whom is the contract for such work to be made, and who is to superintend its construction? From what source are the funds to come that will be required for this work? It has been suggested that they might be raised upon the security of the land, but no attempt was made to point out the principle upon which

the interest of the defendants could, against their will, be burdened with an undefined expenditure.

Without further pursuing difficulties of detail, which do not seem to diminish in magnitude when scrutinized, I am clearly of opinion that the Chancellor was quite right in reversing the certificate, and that the appeal should be dismissed, with costs.

BLAKE, V. C.—When this case was argued I noted the conclusion at which I had then arrived, as follows: “There cannot be a partition in the ordinary mode in which that is carried out, as one party is entitled to one-half and each of the others is entitled to one-fifth of a property which it is admitted, cannot be thus divided.

It is therefore necessary, on the plaintiff asking relief in respect of the estate, to adopt some other means of answering this demand. The ordinary mode is a sale where a partition cannot be made. It is true that, at times, the Court will decree partition of a part and sale of the balance, but this is not done except in cases where this uncommon mode of dealing with the property is clearly beneficial to all.

That does not by any means appear to be the case here. There are so many difficulties in the way of carrying out such a decree, that I do not think it possible to dispose of the matter otherwise than as it is dealt with by the order of the Chancellor. I think his order should be affirmed with costs.”

A perusal of the judgment of the Chief Justice of this Court, and a further consideration of the matter, strengthens me in the view at which I had previously arrived.

PATTERSON and MORRISON, JJ. A., concurred.

Appeal dismissed.

AUGER ET AL. V. THOMPSON.

Express contract—Fraud—Right to sue on common counts.

The defendant gave a note made by one K. to the plaintiffs in exchange for a buggy. The note was not paid at maturity, whereupon the plaintiffs sued the defendant on the common counts for the price, alleging that he had induced them to take the note by fraudulent representations.

Held, reversing the judgment of the County Court, that the plaintiffs could not recover, for there being an express contract to take the note for the buggy, no agreement to pay in money could be implied by reason of the alleged fraud.

THIS was an appeal from a decision of the Judge of the County Court of Wellington, discharging a rule *nisi* to enter a nonsuit or a verdict for the defendant.

The action was upon the common counts for the price of a buggy sold by the plaintiffs to the defendant. The pleas were never indebted, payment, and that one William Kinsey was indebted to the defendant in the sum of \$120, and that by agreement the defendant relinquished his claim against Kinsey, and the plaintiffs accepted Kinsey as their debtor in satisfaction and discharge of their claim against the defendant.

The plaintiff Auger stated that defendant, a week before the note was taken, mentioned to him that he was coming over to their place of business to trade the note in question for a buggy. The defendant did come, accompanied by Kinsey, and being asked to endorse the note distinctly refused, but stated that Kinsey was perfectly good for the amount.

It appeared that the plaintiffs made some enquiries of a person named Fitzgerald respecting Kinsey's circumstances, and his reply was so far satisfactory that it had some influence in inducing them to accept the note. Some work required to be done to the buggy, and it was not delivered to the defendant until three weeks after the note had been given to the plaintiffs. The note was made payable to the order of the plaintiffs, or bearer, and they gave the defendant a receipt, in which it was expressly stated

that they had received payment by note. They made no further enquiries about Kinsey until shortly before the note became due, when it was ascertained that there was a Division Court execution against him in the hands of the bailiff. A few days after the note became due this action was brought. The only step taken by the plaintiffs was to ask Kinsey for payment, when he stated that he could not meet the demand at the moment, but that he would pay one-half in a week, and the remainder in ten days.

At the close of the plaintiffs' case the defendant's counsel moved for a nonsuit on a number of grounds, the principal of which in substance were, that the defendant had not agreed to pay a money consideration for the buggy, and that the plaintiffs having accepted the note in exchange for the buggy could not recover for goods sold, but if they had been defrauded by the defendant's representation that the maker of the note was a solvent person, they should have promptly repudiated the transaction and sued in trover.

The learned Judge was of opinion that if the defendant induced the plaintiffs by fraud to take Kinsey's note in payment, the plaintiffs, when they discovered the fraud, had a right to repudiate such payment, and to sue the defendant for the buggy on an implied promise to pay its value. The jury found against the defendant, on the ground that he had induced the plaintiffs by fraudulent representations to take the promissory note, and they rendered a verdict for \$120, being the amount of the note.

Upon the argument in term, the plaintiffs' counsel asked to add a count in trover, upon which the learned Judge noted that it was hardly consistent with the view of the case which he entertained; but if the case went further, and such an amendment was proper and necessary, it might be made.

The case was argued on the 15th of March, 1878 (*a*).

Bethune, Q.C., for the appellant, the defendant below. The

(*a*) *Present*.—MOSS, C. J. A., PATTERSON and MORRISON, JJ.A.

learned Judge was clearly wrong in holding that a party can be bound by an implied contract when he has made a specific contract. The appellant only agreed to give Kinsey's note in exchange for the buggy; and if it was worthless, the respondents could have rescinded the contract as fraudulent, and sued in trover, or on the case; but no contract to pay cash can be implied. The evidence shews that the respondents did not rely on the appellant's representations, which were only in the nature of puffing; but if they did, there was not any sufficient proof that they were untrue.

Richards, Q. C., for the respondent. This was a sale to either Kinsey or the appellant; and if to Kinsey, inasmuch as it was practically for the purpose of enabling the appellant to get possession of the buggy, he would be liable. If, on the other hand, it is held to be a sale to the appellant, then since he fraudulently represented the note to be good, an action against him for the price of the buggy will lie. He referred to *Hill v. Perrott*, 3 Taunt. 274; *Biddle v. Levy*, 1 Stark. 20.

May 4, 1878 (a). Moss, C. J. A., delivered the judgment of the Court.

If the addition of the count asked for at the trial would remove the difficulty, we should have no hesitation in now acceding to the application. But it is obvious that the plaintiffs could not have succeeded in an action of trover, for they had not repudiated the sale or demanded the buggy.

The learned Judge is logical and correct in his view that the plaintiffs can only recover, if at all, for goods sold and delivered. After a careful consideration of the evidence, we are unable to concur in the opinion that they are entitled to succeed. If the decision of the case had turned upon conflicting evidence, we should have paused long before interfering, whatever might have been our view as to the preponderance of testimony. But we are of opinion

(a) *Present*.—Moss, C. J. A., PATTERSON and MORRISON, JJ. A.

that the evidence admits of no other theory than that the defendant gave the note in exchange for the buggy, and that consequently the only course open to the plaintiffs, upon discovering the worthlessness of the note, was to disaffirm the transaction *in toto*.

The learned Judge, who delivered a carefully prepared judgment, with the greater part of which we concur, overlooked for the moment the distinction between such a case and one where a purchaser at a money price induces the vendor to accept a worthless note as payment of that price. In the case we are considering the defendant did not agree to purchase the buggy at a certain price and then induce the plaintiffs to accept the note as payment.

For my own part I would be quite prepared to hold that upon the plaintiffs' own statements they are not entitled to succeed, because it is manifest that they did not rely upon the defendant's representation, and the evidence is utterly insufficient to fix the defendant with fraud. After making enquiries, after giving a written receipt in the above form, and after having so much time for deliberation, it ought to be very cogent evidence upon which they should now be permitted to assert that they were the innocent victims of a fraudulent representation. Furthermore, I do not think that there is any satisfactory proof that the representations said to have been made by the defendant were not perfectly correct. It falls far short of convincing me that Kinsey is not, as the defendant stated, quite good for the amount.

But it is not necessary to consider these topics, because it is sufficient for the disposition of the case, as it comes before us, that the transaction was one of barter, not one of sale for a money price.

The decision in *Selway v. Fogg*, 5 M. & W. 86, is precisely in point. In the language of Lord Abinger, a party cannot be bound by an implied contract, when he has made a specific contract which is avoided by fraud. The appellant's contract was to give Kinsey's note in exchange for the buggy. If that contract were brought about by fraud,

it might have been wholly repudiated by the plaintiffs, but no agreement to pay the price can be raised by implication of law.

The case of *Sheriff v. McCoy*, 27 U. C. R. 597, upon which reliance was placed in the Court below, seems to us to be distinctly in favour of the defendant. That action was for goods sold, and the defendant pleaded that at the time of the sale the plaintiff agreed to and did receive in payment two promissory notes made by a third person. This plea the plaintiff sought to meet by alleging that he was induced to receive the notes by fraudulent representations.

The Court of Queen's Bench decided that the action could not be maintained.

Mr. Justice Wilson lays down what we have no doubt is the correct rule. He says, at p. 602: "The plaintiff is attempting to make a contract for the sale of goods, when no such sale was ever made in fact or in law, and when the defendant never promised to pay cash. He is not without remedy, for he may sue for the fraud in an action on the case, or in trover for the goods he parted with."

This language is entirely applicable to the present case.

The appeal must be allowed, with costs, and the rule *nisi* in the Court be made absolute for entering a nonsuit.

Appeal allowed.

MERCHANTS' BANK V. BOSTWICK.

Promissory notes—Mortgage as collateral security—Liability—Estoppel.

In May, 1873, H. B. & Co. being indebted to plaintiffs' bank \$60,000, B. executed a mortgage for \$40,000 as security therefor, reciting that it was for money lent on notes made by B. and endorsed by the firm, by defendant, and by Mrs. P. In October, the indebtedness having increased to \$90,000, the bank required as further security a mortgage from the defendant for \$25,000, and one from Mrs. P. for a like amount. The mortgages were similar in form, and recited that the firm's indebtedness, being for moneys previously advanced on promissory notes, made and endorsed, as before stated, exceeded \$25,000, and that such mortgage was given as collateral security for that sum, part of said indebtedness, whether represented by the notes then under discount, or by renewals, or by substitutions therefor, and similarly made and endorsed. There was a covenant for the payment of the indebtedness represented by said notes when due, or by any renewals or substituted notes. B. had been signing defendants and Mrs. P.'s names as endorsers to the notes with their consent, as he alleged, but which defendant denied; and to prevent the bank noticing any difference between the signatures to the notes and to the mortgage, B., with defendant's assent, signed defendant's and Mrs. P.'s names to the mortgages, which they subsequently acknowledged before a witness to be their signatures. Defendant alleged that he then believed the indebtedness to be only \$60,000, being told so by B., but about three weeks after he discovered it to be \$90,000, and he then said nothing to the bank about it. After the mortgages were executed, the notes were renewed from time to time down to the insolvency of the firm in 1877, by B. writing defendant's and Mrs. P.'s names as endorsers, as he stated, with their consent, but which defendant denied. The bank brought actions respectively against defendant personally, and as executor of Mrs. P., who had since died, on the covenant in the respective mortgages, and also on the endorsements. After action commenced the bank realized \$35,000 on B.'s mortgage, and \$6,300 from the firm's estate.

The jury found that defendant did not authorize B. to indorse for him, and that defendant when he gave the mortgage supposed the debt to be only \$60,000.

Held, that the evidence shewed that each mortgage was intended to be an independent security for \$25,000; and that the finding of the jury that the defendant supposed the debt to be \$60,000 was wholly immaterial, as the mere fact that he thought it was only that amount could not, under the circumstances, relieve him from liability upon the mortgage either wholly or partially.

This was an appeal from the judgment of the Court of Common Pleas, reported 28 C. P. 450. The facts are stated there, and in the judgment on this appeal.

The case was argued on March 12th, 1878. (*a*.)

(*a*) *Present*.—MOSS, C. J. A., BURTON, PATTERSON, and MORRISON, JJ. A.

The arguments were substantially the same as in the Court below.

Richards, Q. C., and *Bethune*, Q. C., for the appellants.
Robinson, Q. C., and *J. F. Smith*, for the respondents.

June 25th, 1878^(a). Moss, C. J. A., delivered the judgment of the Court.

There are two actions, in each of which the appellant is defendant, and in each of which an appeal is brought. In one he is sued in his individual capacity, in the other as executor of his sister, Mrs. Parker. For the purposes of the present controversy his position in each is the same.

At the outset it is necessary to determine whether the appellant is correct in his contention that the mortgage given by his sister, and that given by himself, were intended to secure one sum, \$25,000, or whether each was to stand as a security for the amount of the debt which Amos Bostwick owed the bank. I think there can be no doubt that the latter is the correct view of the transaction.

The whole amount which Amos then owed the bank was about \$90,000. He had some months before given the bank a mortgage upon property, which was estimated to be worth \$40,000. The object of the bank was to procure security for the unsecured residue. The evidence of Mr. Rae, one of the bank's solicitors, is perfectly distinct, that the arrangement was that Mrs. Parker and the appellant should give security for \$25,000 each. I think that the proper inference to be drawn from the appellant's own evidence at the trial is, that he so understood the transaction. But his statement before the special examiner seems to me to be perfectly free from ambiguity. He then said in so many words, that the bank wished Mrs. Parker and him to give security for \$25,000 each. The terms of the instruments themselves, the direct testimony,

(a) *Present*.—MOSS, C.J.A. ; BURTON, PATTERSON, and MORRISON, JJ.A.

and the probabilities arising from the known circumstances, irresistibly lead to the conclusion that each was an independent security for the sum of \$25,000.

In order to make the next point taken by the appellant intelligible, it is necessary briefly to refer to the circumstances under which these securities were given. Amos Bostwick, who was a member of the firm of Henderson & Bostwick, had discounted with the bank promissory notes purporting to be endorsed by Mrs. Parker and the appellant. Their names had in fact been written upon the notes by Amos, who alleges that he had authority from the appellant to use his name, but this is denied by the appellant, and the jury have determined that question in his favour. In October, 1873, the appellant received a letter from the bank solicitors, informing him that he must give security upon the amount of his large debt. He says that this was the first time he had any idea that his brother had endorsed his name upon any paper. Upon receiving this note he confronted his brother, who acknowledged that he had used his name. After some consideration Mrs. Parker and he, in order to save the family honour, made up their minds to give security. Neither of them communicated with the solicitors or with any officer of the bank, but the conduct of the arrangements was left to Amos Bostwick. The bank having agreed to accept mortgages from Mrs. Parker and the appellant, the proper documents were prepared by the solicitors and handed to Mr. Stanton, a professional gentleman, who was acting for Amos, by whom they were approved. Amos brought the appellant's mortgage to him, but, instead of signing it, he yielded to the suggestion of Amos that it was better that Amos should sign it, and prevent any chance of the bank noticing the difference between that signature and the signature on the promissory notes. Afterwards Mr. Stanton attended and the mortgage was duly acknowledged by the appellant in his presence. This instrument recites that the firm of Henderson & Bostwick was then indebted to the bank in a sum exceeding the amount thereby secured, being for money previously

advanced to the firm on promissory notes made by Amos and endorsed by the firm, and also by the appellant and Mrs. Parker, and that the mortgagor had agreed to execute it by way of collaterally securing \$25,000, a portion of the said indebtedness, whether the same continued to be represented by the promissory notes already discounted, or by any renewals thereof, or by any notes substituted therefor, and similarly made and endorsed. The proviso is in accordance with this recital, and it is distinctly stated that the mortgage shall be collateral security only to the extent of \$25,000. The appellant swears that at the time he executed the mortgage he believed his brother's representation that the whole amount of his liability to the bank was only \$60,000, and it was not until two or three weeks afterwards that he learned that it was really \$90,000.

Upon the argument, counsel for the bank referred to some portions of the evidence which tend to shew that the appellant may be mistaken in his recollection upon that point, but however that may be, the jury seem to have found the fact in his favour, for in answer to a question put by the learned Judge at *nisi prius*, they said in effect that the defendant supposed the amount of liability was \$60,000. But like the learned Judges of the Court below, we are wholly unable to perceive how that finding can be used for the benefit of the defendant. He chose to trust to his brother's statement instead of making enquiries directly from the bank, and even when two or three weeks afterwards he learned the truth, he made no objection. In truth the finding in question is wholly immaterial. The appellant's belief cannot avail to relieve him from liability upon the mortgage either wholly or partially. After the mortgage Amos Bostwick went on discounting other notes in order to replace the notes then in existence, and signed the names of the appellant and Mrs. Parker, as he had done before. It is difficult to suppose that the appellant, who is a gentleman of some experience in business, can have failed to know that this course was being taken. But whatever he may have believed, there is no room for the

suggestion that the bank officers had any reason to suspect that the signatures were not genuine. This state of things continued for upwards of three years, until Henderson & Bostwick were placed in insolvency.

The point for the consideration of which it appeared proper to state these facts is this: the appellant argues that, while conceding that by the execution of the mortgage he estopped himself from denying that they were genuine notes to the amount of \$25,000, and perhaps a nominal sum beyond, held by the bank, he made no further admission, and incurred no other liability except to meet that amount of notes, which the bank might claim to be valid; and that Mrs. Parker is in the same position. Now Amos Bostwick had given the bank a mortgage, as has been mentioned already, and that security has produced more than \$25,000, and the argument is, that notes to a greater amount than that sum having been thus paid, the appellant is entitled to say that those were the notes of which he admitted the genuineness by executing the mortgage. Again, it is urged that there was no admission of the genuineness of any particular notes, and that contemporaneously with the payment of the sum of \$25,000 he could require the bank to deliver to him notes for that amount. For example, if he paid the amount due under Mrs. Parker's mortgage, he could require the delivery of that amount of notes, and then upon the bank demanding payment of his own mortgage he could say: You must first produce genuine notes to the amount of \$25,000, and upon the bank producing notes to that amount, he could rejoin, these are not my signatures, and the notes for \$25,000 which you have already given up on Mrs. Parker's mortgage being paid, are those which I admitted to be genuine.

We do not think that these positions can possibly be sustained. It is true that the mortgage does not state the amount of the debt due to the bank, but its very object is to deal with advances made upon notes which purported to be, and which the bank supposed to be, endorsed by the

defendant. The thing, as collateral security to which the mortgage is taken is the debt represented by notes purporting to be endorsed by the appellant. The same description is given of all the notes in the hands of the bank upon which the appellant's name appeared. We think it is clear that he thereby ratified every note held by the bank which answered the given description. Then his agreement was to be liable in respect of promissory notes "similarly made and endorsed." The notes subsequently discounted with the bank were precisely similar. The signatures which purported to be his own were identical with those on the notes in existence at the time of giving the mortgage, and the attempt now to set up that they are not covered by this mortgage seems opposed to every principle of law or justice.

The suggestion that the proceeds of the property comprised in Amos's mortgage should be applied in the first instance in discharge of these mortgages, is effectually disposed of by the appellant's own evidence, which shews distinctly and unequivocally that these securities were intended to supplement the others, which were deemed insufficient.

The appeals must be dismissed, with costs.

Appeal dismissed.

CAMERON V. KERR.

Collateral security to bank—Appropriation of payments.

M. & Co., being desirous of obtaining additional advances from a bank, executed a mortgage to secure a large sum for which they were liable on the 31st December, 1873, on commercial paper of the firm and its customers which had been discounted by the bank. The mortgage provided that it should continue a security for the said sum and all renewals or substitutions therefor, and all indebtedness of M. & Co. in respect thereof. After the mortgage was given M. & Co.'s line of discount was increased, but no separate account of the liabilities secured by the mortgage and these further advances was kept, the proceeds of the discounts and cash deposits being carried to M. & Co.'s credit in one open current account, against which they drew cheques to retire the notes secured by the mortgage as they matured. M. & Co. became insolvent on the 12th August, 1875, their indebtedness in the meantime never having been reduced.

Held, affirming the judgment of BLAKE, V. C., that this mode of keeping the accounts had not operated as a discharge of the mortgage debt.

This was an appeal from a decree of Blake, V. C., reversing the finding of the Master that the debt secured by the mortgage in question had been paid off.

The decision of the Master is reported in 7 P.R. 265, and the facts are sufficiently stated there, and in the judgment on this appeal.

The case was argued on the 12th March, 1878. (a)

Robertson, Q. C., J. A. Boyd, Q. C., W. B. McMurrich, and H. Symons, for the appellants.

MacLennan, Q. C., (Rae with him) for the respondents. The arguments were substantially the same as in the Master's office. The following additional authorities were referred to :—

For the appellants: *McDonald v. The Bank of Upper Canada*, 7 U. C. R. 252; *Royal Canadian Bank v. Cummer*, 15 Gr. 627; *Brown v. Adams*, L. R. 4 Ch. 746.

For the respondents: *Clancarty v. La Touche*, 1 B. & B. 428; *Rufford v. Bishop*, 5 Russ. 346; *Morse v. Salt*, 22 Beav. 269; *Wooley v. Jennings*, 5 B. & C. 165; *Williams v. Rawlinson*, 10 Moo. 362; *City Discount Co. v. McLean*, L. R. 9.

(a) *Present*.—MOSS, C. J. A., HAGARTY, C. J. C. P., PATTERSON and MORRISON, J. J. A.

C. P. 692; *Fenton v. Blackwood*, L. R. 5 P. C. 176; *Commercial Bank v. Grant*, 7 Gr. 250, 423; *Stark v. Bank of Montreal*, unreported,

June 25th, 1878. (a) Moss, C. J. A., delivered the judgment of the Court.

I agree with the opinion of the learned Vice-Chancellor, that the doctrine of *Clayton's Case* is inapplicable.

I think that the principles upon which this controversy should be disposed of are to be found stated in such cases as *The City Discount Co. (Limited) v. McLean*, L. R. 9 C. P. 692, and *Fenton v. Blackwood*, L. R. 1 P. C. 176. In the former case the defendant had given the plaintiffs a limited guarantee in respect of an advance made to a customer named Southgate. A great number of further advances were made by the plaintiffs to their customer upon fresh discounts in the usual course of business. A long debtor and creditor account had been kept by the plaintiffs of these transactions, including the advances made under the guarantee. The head note summarizes the facts, which are so apposite that it is worth while to read a portion:—"In this account the practice was to credit S. with the amount of the bills discounted, less discount and commission, and debit him with the amount of the bills if they were dishonoured. Many of the bills discounted were renewed at maturity, and the same system of crediting and debiting applied to the renewals.

"The account was balanced on several occasions before S. failed, and shewed balances against S. of much less amount than the sums advanced under the guarantee, but these balances were arrived at by crediting S. with the amount of outstanding bills, many of which were not paid at maturity, and were included in the ultimate balance against S. Bills were discounted with the plaintiff by S. to cover advances made under the guarantee, and were from time to time renewed, but never were paid. Bills dis-

(a) *Present*.—MOSS, C. J. A., HAGARTY, C. J. C. P., PATTERSON and MORRISON, JJ. A.

counted by S. with the plaintiffs after the advances under the guarantee, had been paid to an amount exceeding the sum guaranteed, but it did not appear that in point of fact the balance really due from S. to the plaintiffs after the date of the guarantee was ever less than the sum guaranteed."

The defendant's contention was identical with that of the present appellants, namely, that the plaintiffs having included the transactions as to the advances made under the guarantee with the rest of the transactions, the earlier credits must be applied to the earlier debits, and these advances treated as paid.

Bramwell, B., in delivering his opinion in the Exchequer Chamber, approved of the doctrine of *Clayton's Case*, but proceeded to observe that every case must be decided according to its own circumstances. He continues by saying at p. 699: "For instance, premises being mortgaged to secure the advances made under the guarantee, would Southgate have been at liberty to go to the plaintiffs and insist on a return of the security on the ground that the debt was extinguished? That would be to hold something absurdly contrary to what may be presumed to have been in the contemplation of the parties. * * The matter would have been abundantly plain if they had thought fit to keep their books in a different way, which, for business purposes, would have been very inconvenient, viz., by debiting the advances in the first instance, and not giving credit for the bills, but keeping a separate account as to them."

He also points out that for convenience sake bankers keep their account with a customer in such a manner as to see at any time the state of the balance; and that it is impossible to hold that mere book-keeping arrangements can alter what, from the substance of the transactions, must clearly have been the intention of the parties.

These views were fully supported by the opinions of the other learned Judges who took part in the judgment.

In delivering the judgment of the Judicial Committee

in *Fenton v. Blackwood*, L. R. 5 P. C. 167, Sir Robert P. Collier observed that the accounts in question appeared to have been made out in ordinary case, as between merchants, to shew the general state of their dealings, but that it ought not to be presumed that this form of statement was intended to alter the substance of the transactions.

When these principles are applied to the present case, it seems to me to be absolutely free from difficulty. It appears that on the 31st December, 1873, the firm of Moffatt, Bros. & Co., consisted of Lewis Moffatt, Kenneth M. Moffatt, and L. Henry Moffatt. In the course of their business they had become indebted to the Merchants' Bank in the sum of \$153,011, for which the bank held bills and notes that had been discounted. A line of discount to the extent of \$125,000 had been allowed to them, but this having been exceeded, the bank were pressing them to reduce the amount. They, on the other hand, desired to have their credit increased to \$175,000. To this request the bank, after some negotiations, agreed to accede upon receiving security by way of mortgage upon certain real estate belonging to Lewis Moffatt. Kenneth Moffatt was on the eve of retiring, if he had not actually retired, from the firm, but he joined in the mortgage, and also expressly agreed that the bank should be at liberty to deal with the firm or their successors, and to make such business arrangements as they might deem just and proper, and that he would not set up against them in respect of their dealings any of the doctrines of law or equity in favour of a surety.

The mortgage, which was actually made on the 26th of January, 1874, recites that the mortgagors were indebted to the bank for debts contracted in the course of banking, for which the bank held the commercial paper of the customers, and that the mortgagors had applied for additional advances, which the bank had agreed to make upon receiving security for the existing indebtedness. The defeasance is on payment of \$153,011 in nine months, and all bills of exchange, &c., together with all renewals, substitutions, and alterations thereof, and all indebtedness of

the mortgagors to the bank in respect of the said sum. It is expressly stated to be the intention that it shall be a continuing security to the bank for the above amount, notwithstanding any change in the membership of the firm, and also to secure and cover any sum due, or to become due in respect of the interest or commission upon the said notes or renewals, or other commercial paper.

The Master has concisely stated the nature of the subsequent transactions, and the mode of keeping the accounts adopted by the bank :—"The line of discount of the Moffatts was, as arranged, increased after the giving of the mortgage, but instead of separate accounts being kept of the dealings between them and the bank in respect of the liabilities secured by the mortgage and these further advances, all were mixed in one common account.

"From time to time notes were sent in by the Moffatts for discount. These were discounted without any regard to the amount of notes falling due. The proceeds of the discounts and the cash deposits they made, were all carried to their credit in one open current account. Against that they drew cheques as the exigencies of their business required. As the notes held by the bank on the 31st December, 1873, matured, cheques were drawn to retire them; the cheques were charged against the Moffatts in their current account against the fund to their credit in the bank, made up from the proceeds of fresh discounts, and from cash deposits, and the notes were delivered up to the Moffatts.

"In this way, during the month of January 1874, alone, notes held by the bank on the 31st of December preceding, to the amount of \$65,907.87, were retired.

"During the next few months the monthly transactions between the bank and the Moffatts, the proceeds of discounts and deposits on the one hand, and the drawing on the other, varied from \$175,000 to \$300,000, the account continuing throughout to be operated on in the same way."

The Master was of opinion that the mode of book-keeping adopted by the bank was fatal to its claim upon

this mortgage, and that in fact Moffatt could claim that it was discharged when the notes held by the bank on the 31st December, 1873, were retired. It is obvious that this is wholly opposed to the real intention of the parties, and disregards the substance of the transaction.

Beyond all question what the parties intended was, that the existing debt should be treated as secured, notwithstanding any transactions in the shape of fresh discounts, or drawing of cheques against the account, or removal by such cheques of the notes by which the debt was at that time represented. They were to give him credit to the extent of \$175,000 in all, in consideration of receiving security for the amount he then owed. Upon that amount the parties never intended that cash deposits or the proceeds of fresh discounts should be applied, as they were made.

The absurdity of that contention is apparent from the figures, which shew that the credits placed to the Moffatts' account between the 1st of January and the 27th of January, the date of the mortgage, amounted to \$157,354. The effect of this would be that at the date of the mortgage it had actually been all paid off, the debt of \$153,011, due on 31st December, having been discharged. Or if the appropriation be confined to the notes which were retired during the interval between the 31st of December and the 27th of January, the amount secured would, according to the Master's view, instead of being \$153,011, be less than \$105,000, for these retired notes amounted to about \$49,000.

In order to demonstrate that nothing could be more contrary to the real intention of the parties, it is quite unnecessary to refer to the oral testimony, or to a letter written by Mr. Moffatt on the 1st of June, 1875, long subsequent to the time when all the notes under discount on 31st December, 1873, had been retired, in which he manifestly treats this as an existing security.

A single circumstance may be referred to as in itself almost conclusive. Mr. Moffatt was desirous that the mortgage should not be registered, lest it should prejudice

his commercial standing, and an arrangement was made that the registration should be postponed. It was not in fact registered until long after the date at which every one of the old notes had been retired, and yet no objection was made when registration was insisted upon.

There is no ground for the argument that the taking of this security was in violation of the provisions of the Banking Act. The transaction was in no sense an advance or discount upon the security of real estate. Indeed, the Master did not proceed upon that ground, but solely upon the mode of keeping the accounts.

We think the appeal should be dismissed, with costs.

Appeal dismissed.

NORTHWOOD V. RENNIE.

Sale of goods—Warranty—Statute of Frauds.

The plaintiff sued the defendant for a breach of warranty of a hay press, which he had agreed to purchase from him if it should be capable of pressing into bales 10 tons of hay per day, which, as he alleged, the defendant had warranted it would do. The machine was delivered to the plaintiff, but upon trial failed to do the stated amount of work, and was returned. The defendant denied the warranty, and gave evidence to shew that the sale was only a conditional one. At the close of the plaintiff's case a nonsuit was moved for, on the ground that an action would not lie on the warranty as there had been no sale, and that the Statute of Frauds was a bar. Leave was reserved to move on the whole case. These objections were renewed at the close of the case, and it was afterwards arranged that the questions to be submitted to the jury should be, whether a guarantee was given by the defendant that the machine would do the above amount of work, and was broken, and the damages. The jury found a verdict for the plaintiff.

Held, affirming the judgment of the C. P. 28 C. P. 202, that the verdict was amply supported by the evidence, set out in the case, as to the guarantee. *Semble*, that the arrangement entered into at the trial precluded the defendant from objecting that no action would lie on the warranty, because there was no sale; but that it did not apply to the objection founded on the Statute of Frauds, which, however, did not affect the plaintiff's right of action, for that it was not necessary for such a warranty to be in writing.

This was an appeal from a judgment of the Court of Common Pleas, discharging a rule *nisi* for a nonsuit or a new trial, which had been obtained by the defendant, reported in 28 C. P. 202. The facts are fully stated there, and in the judgment below.

The case was argued on the 17th May, 1878 (*a*).

A. Galt, for the appellant. The evidence shews that the defendant acted throughout this transaction as agent for Dederick, and no fraud, negligence, or *mala fides* having been alleged or proved, he is not liable. The contract, if any, was within the Statute of Frauds, and was not evidenced in writing, nor was anything shewn to take it out of the statute. The Court below held that it was executed by delivery, but delivery alone in such a case is insufficient to satisfy the Statute: *Smith v. Hudson*, 6 B. & S. 431; *Caul-*

(*a*) *Present*.—MOSS, C. J. A., BURTON, J. A., HARRISON, C. J. O., and MORRISON, J. A.

kins v. Hillman, 47 N. Y. 449; *Benjamin on Sales*, 2nd ed., 116 *et seq.* The intention of the parties is the true criterion whether the property in the article was to pass or not, and here both parties agree in saying that the plaintiff was to keep the press on condition that upon trial it should prove satisfactory: *Ross v. Eby*, 28 C. P. 316; *Bannerman v. White*, 10 C. B. N. S. 844. There having been no binding sale, an action cannot be brought on a warranty dependent on the sale and forming an ingredient in it: *Barker v. Cleveland*, 19 Mich. 230; *Benjamin on Sales*, 2nd ed., 748. No warranty, however, was proved; but if any was given the correspondence shews it must have been after the sale, without any consideration, and is therefore void: *Roscorla v. Thomas*, 3 Q. B. 234. At most the alleged warranty was only a representation, in which case the respondent should have averred and proved a *scienter*: *Chandelor v. Lopus*, 1 Sm. L. C., 7th ed., 175; *Budd v. Fairmaner*, 8 Bing. 52. The evidence does not establish that the press was incapable of doing the work required, but merely that it failed to accomplish it with the power supplied. The damages should only have been nominal, as it is well settled that where a action is brought on a warranty of an article which has been returned, the damages recoverable are merely the purchase money paid, and in this case no purchase money had been paid. The evidence of special damage should not have been received, as it could not have reasonably been in contemplation of the parties, and it did not reasonably flow from the breach alleged: *Hadley v. Baxendale*, 9 Ex. 354.

The Court below had no right to allow the amendment to the declaration, as it was not asked for either at the trial or during the argument in term. He referred to *Cutter v. Powell*, 2 Sm. L. C. 19, 7th ed.; *Germaine v. Burton*, 3 Stark 32; *Hunt v. Hecht*, 8 Ex. 814; *Jones v. Bright*, 5 Bing. 533; *Chitty on Contracts*, 10th ed., 414-420, 422; *Mayne on Damages*, 2nd ed. 129-162; *Benjamin on Sales*, 2nd ed., 39; *Street v. Blay*, 2 B. & A. 461; *Aceba v. Levy*, 10 Bing. 376; *Kent v. Huskisson*, 4 B. & P. 233

Clapham v. Shilletoi, 7 Beav. 149; *Pasley v. Freeman*, 3 T. R. 57.

Robinson, Q. C., for the respondent. It cannot now be asserted that this action will not lie because there was no sale, inasmuch as the question of whether there had been a sale was withdrawn from the jury by arrangement. But the contention that there must have been an absolute sale of the hay press to support an action on the guarantee is entirely untenable. In *Randall v. Newson*, L. R. 2 Q. B. D. 102, and *Smith v. Green*, L. R. 1 C. P. D. 92, the action was sustained, although there was no binding contract under the Statute of Frauds. There can be no question on the evidence that the guarantee was given by the appellant. In the affidavit used by him to get the trial postponed, he expressly states that he guaranteed the hay press. Nor can it be contended that he was only agent for Dederick, as in the letter which Dederick wrote to the plaintiff, he says that the sale was to the appellant, and the appellant himself admits this in his affidavit. Then it is insisted that the guarantee was void because it was given after the sale; but in giving this warranty they were fulfilling the old bargain. The Statute of Frauds does not apply to this case; but if it does, the evidence shews a delivery and acceptance sufficient to satisfy its requirements. It is well settled that there may be an acceptance under the Statute, leaving it open to the purchaser to object to the quality of the goods. The amendment, if necessary, was properly made, but without such amendment the action would lie and the evidence would have supported the verdict. The damages were fully warranted by the evidence. He referred to *Smeed v. Foord*, 1 E. & E. 602; *McMaster v. Gordon*, 20 C. P. 16; *Remick v. Sandford*, 120 Mass. 309; *Robinson v. Gordon*, 23 U. C. R. 143; *Passinger v. Thorburn*, 34 N. Y. 634; *Benjamin on Sales*, secs. 97, 150, 894, 2nd Am. ed.

Galt, in reply. The authorities cited by the respondent are widely distinguishable from this case. In *Smeed v. Ford*, 1 E. & E. 602, the plaintiff had paid his purchase

money. In *Randall v. Newson*, L. R. 2 Q. B. D. 102, the judgment was mainly based on the fact that the defendant was the manufacturer of the goods sold. In *McMaster v. Gordon*, 20 C. P. 16, a portion of the goods had been resold by sample. In *Remick v. Sandford*, 120 Mass. 309, the rule is laid down that "acceptance * * * must be by some unequivocal act done on the part of the buyer with intent to take possession as owner," and certainly no such possession as this is shewn by the respondent.

June 25th, 1878, (a). Moss, C. J. A.—The gist of the plaintiff's cause of action was that he had purchased from the defendant a hay press at the price of \$500 and that the defendant warranted that the machine, when delivered, should be capable of pressing into bales ten tons per day, whereas the hay press which was actually delivered was of inferior quality, by which the plaintiff had sustained damage. By his pleading the defendant denied any special agreement or warranty, and also alleged that he did deliver to the plaintiff a hay press called "Dederick's Perpetual Baling Press," capable of pressing into bales ten tons per day. At the trial evidence was entered into with respect to the terms of the bargain between the plaintiff and defendant, and also with respect to the quantity and capacity of the machine. We may observe here that we agree with the Court below in thinking that the plaintiff's evidence established that it wholly failed to do the stated amount of work. The plaintiff's own statement of his arrangement with the defendant is confused and difficult of apprehension. At one time he seems to speak of it as an absolute sale, and at another as a sale upon condition that he found it did the stipulated work. At the close of the plaintiff's case, a nonsuit was moved for on the ground that no contract had been proved, and that the Statute of Frauds was a bar. The learned Judge having declined to nonsuit, evidence was given on behalf of the defendant, and

(a) *Present*.—Moss, C. J. A., BURTON, J. A., HARRISON, C. J. O., and MORRISON, J. A.

in reply. At the close of the case the objections taken as grounds of nonsuit were renewed, and it was submitted that no money having passed, the plaintiff could not maintain an action for damages, and that the machine having been returned, and no money paid, no action will lie. Leave was reserved to the defendant, to move upon the whole case.

The learned Judge makes the following report of what then occurred:—

“After discussions of the position of the case on the evidence, and with reference to the law, particularly the questions which were discussed in *Abel v. Church*, it appears that as the defendant contends that there was no absolute sale, but only a sale on a condition which failed; and as the plaintiff (whose evidence is both ways as to the sale being absolute and conditional), shews that he accepted, by defendant's consent, an order given by Dederick for the machine, and that therefore, if there was a sale, it must be treated as rescinded:—therefore, there is to be no question as to plaintiff being liable to keep the machine, or to pay for it; and the question is to be, was there a guaranty by the defendant, that he would send a machine capable of doing certain work, and was that guarantee broken, and what are the damages from that breach. The matter is discussed in order to arrive at a definite understanding as to the issues to leave to the jury, as the whole matter of the purchase, payment and damages must be settled in this action, without making two actions necessary, as in *Abel v. Church*.”

The learned Judge charged the jury that if the bargain between the plaintiff and defendant was only that the machine was to go on trial and be returned in case it proved unable to do the amount of work stipulated for, the defendant was not liable, but that if the defendant guaranteed that the machine should be fit to do the amount of work, they should find for the plaintiff with damages. They returned a verdict for \$250, which the Court refused to disturb.

Mr. Galt, who addressed to us a clear and carefully pre-

pared argument on behalf of the defendant, contended that there was no sufficient evidence of any warranty. We are clearly of opinion that there was abundant evidence to warrant the jury in finding that the defendant had in fact warranted the machine. Indeed we are satisfied that it is vain for the defendant to hope that any jury would ever find differently. At a previous Assize, defendant had made an affidavit to postpone the trial in order to enable him to procure the evidence of the manufacturer. In it he pointedly speaks of the guarantee he gave on the sale of the machine, and swears to his belief that the manufacturer would prove that the machine sent was sufficient to satisfy the guarantee. While making every allowance for inaccuracy of expression in an affidavit hastily prepared, it is impossible to read it without the conviction that he was then resting his defence on the sufficiency of the machine. There are other circumstances leading to the same conclusion, which have been commented upon by the Chief Justice of the Common Pleas, and we need say no more than that we fully adopt his views upon that question. Upon the questions, therefore, which according to the arrangement at the trial were submitted to the jury, the verdict is amply supported by the evidence.

But it is further argued that upon the whole case the defendant is entitled to have the plaintiff nonsuited. It is somewhat difficult to perceive how such a motion can be acceded to after what occurred at the trial. There is much force in the contention that the understanding that certain questions should be submitted to the jury was a waiver of the previous objections. But although we are not disposed to take so strong a view of its effect we think there can be no doubt that it effectually removed from further consideration the question of whether there was a sale. It is plain that that which was properly a question for the jury was withdrawn by arrangement, and it would be obviously unjust to allow the defendant now to insist, as he seeks to do, that no action will lie on the warranty, because there was no sale. It is satisfactory,

however, to feel that the defendant has not been really prejudiced by the course adopted, for we entertain no doubt that if that question had been submitted to the jury, they would have found for the plaintiff. We have not the least idea that the jury would have accepted the theory that the defendant was acting as agent either for Dederick or for the plaintiff.

But we do not think that the arrangement at the trial should preclude the defendant from insisting upon the objection founded upon the Statute of Frauds. We agree with the court below in the opinion that the plaintiff's right of action is not affected by the Statute. For all the purposes of the present controversy the defendant's liability must be held to be the same as if he had made a verbal warranty upon a sale of a machine to be manufactured, and the machine, when delivered, had not been of the proper description. It cannot be contended that such a promise need be evidenced by writing.

We cannot help thinking that in view of the defendant's earnest and apparently honest efforts to meet the plaintiff's requirements, the jury might have fairly taken a more lenient view of the quantum of his liability, but we entirely agree with the Court below that the amount is not such as to warrant any interference with the verdict on that ground.

The appeal must be dismissed, with costs.

Appeal dismissed.

THE CORPORATION OF THE TOWNSHIP OF WALLACE V. THE
GREAT WESTERN RAILWAY COMPANY.

Railway company—Covenant to erect and maintain a station—Specific performance.

In consideration of a bonus granted by the plaintiffs, the Wellington, Grey, and Bruce R. W. Co., covenanted "to erect and maintain a permanent freight and passenger station" at G. Shortly afterwards the road was leased, with notice of this agreement, to the defendants, who discontinued G. as a regular station, merely stopping there when there were any passengers to be let down or taken up.

Held, affirming the decree of SPRAGGE, C., 25 Gr. 86, that the mere erection of station buildings was not a fulfilment of the covenant, and that the municipality was entitled to have it specifically performed.

The decree, which enjoined the defendants from allowing any of their ordinary freight, accommodation, express, or mail trains, other than special trains, to pass without stopping for the purpose of taking up and setting down passengers, was varied by limiting it to such trains as are usually stopped at ordinary stations.

THIS was an appeal by the defendants, the Great Western Railway Co., from a decree pronounced by the Chancellor, perpetually enjoining them from allowing any of their ordinary freight, accommodation, express, or mail trains, other than special trains, to pass the station of Gowanstown, without staying there for the purpose of taking up and setting down passengers, and directing them to keep and maintain a permanent freight and passenger station for the receipt and despatch of freight, and the taking up and putting down of passengers at Gowanstown, according to an agreement to the benefit of which the plaintiffs were entitled. The case below is reported, 25 Gr. 86, where the facts are sufficiently stated.

The case was argued on the 6th March, 1878 (*a*).

Boyd, Q. C., and with him *W. Cassels*, for the appellants. Under the agreement the Wellington, Grey, and Bruce Railway Co. were only bound to build a station at Gowanstown; it contained nothing binding them to keep officers and agents there. But the appellants are not in any way liable on this agreement or covenant, as it is not one which

(*a*) *Present*.—MOSS, C. J. A., PATTERSON and MORRISON, JJ. A., and BLAKE, V. C.

runs with the land, and there is no privity between the appellants and the Corporation. If the respondents have any remedy it must be on the covenant against the Wellington, Grey, and Bruce Railway. It is submitted, however, that the appellants have sufficiently complied with the terms of the agreement by using it as a stopping place for passengers and goods. The receipts do not warrant the company in keeping an agent there, and under such circumstances they are not bound to do so. It is for the company to say what accommodation is necessary: *The Midland R. W. Co. v. The Ambergate R. W. Co.*, 10 Ha. 370. The judgment of the Court below proceeded on the case of *Edwards v. The Grand Junction R. W. Co.*, 1 M. & C. 650, but this case has been virtually overruled: *Preston v. Proprietors of the Liverpool, &c., R. W. Co.*, 5 H. L. C. 605; *Earl of Shrewsbury v. North Staffordshire R. W. Co.*, L. R. 1 Eq. 593. The doctrine of lessor and lessee is not applicable to the case of legislative assignees: *Great Western R. W. Co. v. Bennett*, L. R. 2 H. L. 27; *The East Anglian Railways Co. v. The Eastern Counties R. W. Co.*, 11 C. B. 775. Under the statute authorizing the leasing of this road, 36 Vic. ch. 82, sec. 1, O., the appellants had full discretion as to the working of the said branch line, which would exonerate them from all liability to perform this agreement even if they had notice of it. At all events the decree is clearly wrong in treating the agreement as one providing for a first-class station, and ordering that every train should stop there. The proper remedy for any breach of the agreement should be by way of claim for pecuniary compensation, as it is not sufficiently definite or specific to be enforced in specie by the Court of Chancery. They referred to *Wilson v. Northampton and Banbury Junction R. W. Co.*, L. R. 9 Chy. 279; *Hood v. North Eastern R. W. Co.*, L. R. 8 Eq. 666, 5 Chy. 528; *Bowes v. Law*, L. 9 Eq., 636; *Clements v. Welles*, L. R. 1 Eq. 200.

Bethune, Q. C., (with him *C. Moss*), for the respondent. The relief which the respondents are entitled to is the specific

performance of the agreement, as this is not a case where damages would be any compensation to them. The evidence shews that the appellants have broken this agreement, and their answer explicitly denies our right to call for its performance. We submit that the appellants, as lessees of the road, are burdened with the obligation to keep and maintain a permanent freight and passenger station at Gowanstown. It cannot be held that that agreement has been complied with by the mere erection of a station, as the agreement clearly requires that it should be kept open for the purpose of receiving and discharging freight and taking up and setting down passengers. The appellants cannot shelter themselves under the plea of a purchaser for value without notice, as such a plea is not applicable to this case, but even if it were, it has not been properly set up in the answer; and under the statements in the answer it was not competent for them to give evidence of a purchase for value without notice. The evidence, however, shews that they had actual notice of this agreement although actual notice was not necessary, for this is a case in which constructive notice will be presumed. The decree rightly defines the duty imposed upon the appellants in connection with the station, but if they were dissatisfied with the terms of the decree in this respect they should have obtained a reference to ascertain what would be proper accommodation to satisfy the agreement.

Boyd, Q. C., in reply. The onus of shewing express notice is clearly on the respondents: *Carter v. Williams*, L. R. 9 Eq. 678. Being statutory assignees it is not to be assumed that they had notice at all.

June 25, 1878. (a) Moss, C. J. A., delivered the judgment of the Court.

It appears that the Wellington, Grey, and Bruce Railway Co., when constructing a portion of their railway called the extension, obtained the passage of a by-law by

(a) *Present*.—MOSS, C. J. A., PATTERSON and MORRISON, JJ.A., and BLAKE, V. C.

the plaintiffs granting them aid to the extent of \$10,000. It was an inducement to the plaintiffs to submit the by-law, and to the ratepayers to carry it, that there was an undertaking on the part of the company to erect and maintain a permanent passenger and freight station at Gowans-town. As submitted for the popular vote, and as finally passed, it contains an express stipulation, that before the reeve shall issue the debentures the company shall furnish him with an agreement, under their seal, undertaking that the line of the railway should pass through the township in a certain general direction, and that the company should erect and maintain a permanent station on the south side of the town line. The direction of the line and the position of the station having been exactly fixed, an agreement under seal was executed by the company and the plaintiffs, by which, after reciting the by-law, it was stipulated that the extension should branch off from the main line at a certain point and proceed to Listowel "with a permanent freight and passenger station at Gowanstown, built within a distance of six chains from the south west angle of lot No. 24, provided no natural or engineering difficulties prevent its being placed within these limits." The plaintiffs then delivered their debentures to the company, and the company in pursuance of their agreement erected at Gowanstown a freight and passenger station, which was for a time kept open and maintained for general business and traffic in the ordinary manner.

It will be convenient here to dispose of a point raised on behalf of the appellants. That point is, that the agreement was performed and fully satisfied on the part of the company by the mere erection of the station buildings, and that no obligation to keep a station at that point was ever created. We entirely concur in the opinion which the learned Chancellor has expressed, that it is manifest that what the parties were contracting about was the convenience and advantage of having passengers taken up and set down, and freight carried to and from the place designated for a station; that this

was what the plaintiffs purchased and paid for, and less than this would be a mere mockery. The reasoning of James V. C., in *Hood v. North Western Railway Co.*, L. R. 8 Eq., 666, shews conclusively that such a construction should be peremptorily rejected. Even if it could have been sustained as a question of strict law, it does not appear to be more meritorious than that which the learned Judge in the case just cited characterised as not a very creditable or a very honest defence.

The next circumstance to be noted is that on the 23rd December, 1872, the Wellington, Grey, and Bruce Railway Co. leased this extension to the Great Western Railway Co. A copy of this lease does not appear upon the appeal book, but it is conceded that it is precisely similar in terms to the combined agreements of June 1869, and June 1870, by which the former company had leased their main line before the construction of the extension to the latter company for the term of 1,000 years. These agreements were made under the authority of 27 Vict. c. 93, s. 23. Various Acts of the Provincial Legislature were passed in amendment of the original charter, which do not seem to be material to the questions now raised, except that they aid the inference which the evidence suggests, that the Great Western Railway Co. was at least as actively concerned as the other company in procuring bonuses from municipalities. We gather from the evidence that this extension was never worked by the Wellington, Grey, and Bruce Railway Co., but that before it was effectively opened for public traffic, the formal transfer to the appellants was effected. For some time the Great Western Railway Co. kept the station house at Gowanstown, and had an agent there for the transaction of business in the ordinary manner. In the winter of 1874 the building was closed, and the agent withdrawn, but all passenger trains except one daily stop at the platform. There is no officer of the company there to sell tickets or to make arrangements for despatching or receiving freight. The plaintiffs complained of this breach of the

agreement, as they deemed it, when the General Superintendent curtly replied that the Great Western Railway Co. accepted the lease without any knowledge of the existence of the agreement, and neither at the time of the execution of the lease nor when it was confirmed by Act of Parliament were they informed by the Wellington, Grey, and Bruce Railway Co. that they had entered into any such obligation; and that under these circumstances the appellants could not feel themselves bound to carry out the agreement, and the existence of a station at Gowantown must depend solely on the prospect of a paying business at that point. He added that the private letter in which the plaintiffs' clerk pointed out the advantages of the location would receive favourable consideration, but that so far as any legal obligation was concerned, it must be distinctly understood that it was repudiated by the company. It will be observed that the company did not then pretend that the obligation was in point of fact being performed, or that its terms had been fully satisfied by the erection of the station. Upon this emphatic denial of responsibility the Bill was filed.

By their answer the company claimed the position of purchasers for value without notice, and alleged that having found that the amount of travel and traffic was so small as to make it unprofitable and a source of loss to keep open the station house, they had for that reason ceased to keep a station master or freight agent and other officials there, but that trains stop when there are any passengers to take on or let off at that point. They also submit that the agreement is not of such a character as to be susceptible of specific performance.

The last objection is completely met by the case of *Hood v. North Eastern Railway Co.*, L. R. 8 Eq. 666, 5 Chy. 528. There is no difficulty in determining whether acts of the company fairly and reasonably amount to the maintaining of a freight and passenger station at a given point. In the case just referred to the Court was not deterred from granting relief by the same argument being

used with regard to an agreement for a first class station. This case is entirely distinguishable from one in which the Court refuses to undertake the superintendence of the execution of works. No reasonable man can doubt that the company understand perfectly well what would be a fair and honest discharge of the obligation to maintain such a station at Gowanstown. No more can any one doubt that the company are perfectly aware that that obligation is now being disregarded. Indeed, as we have already pointed out, the answer does not hazard the assertion that a station is maintained in accordance with the agreement. By unmistakable implication it admits that no arrangements exist for receiving freight at that point, and confines their practice in stopping trains to occasions in which there are passengers to be taken on or left off.

Then, the obligation not being fulfilled, the next question is, whether the appellants can shelter themselves under the plea of purchase for value without notice. It is argued that the learned Chancellor rested his judgment upon the decision of Lord Cottenham in *Edwards v. Grand Junction Railroad Co.*, 1 M. & C. 650, without regarding at the moment the effect of the later authorities. No doubt it must now be taken to be settled that the doctrine of Lord Cottenham, that a company after its formation is bound by the acts or contracts of its promoters, was, at least, too broadly stated, and so far as it applies to anything to be done which is *ultra vires* of the company must be considered to be overruled. The law upon this point has been lucidly explained by Sir Richard Kindersley, in *Earl of Shrewsbury v. North Staffordshire Railway Co.*, L. R. 1 Eq. 593. We apprehend, however, that the object of the learned Chancellor in referring to the judgment of Lord Cottenham was not so much to ground himself upon it, as to use by way of illustration the general principles of equity which were invoked in that case. But we do not agree with the contention that the judgment of the learned Chancellor in the present case is based upon *Edwards v. Grand Junction Railway Co.* The cases are by no

means analogous. This contract was not entered into by persons promoting the formation of the Great Western Railway Co. It was made by a perfectly formed company, within the scope of its powers, and the Great Western Railway Co. have since become in effect the owners of that Company's line. The Chancellor has found, and we think upon the clearest grounds, that the appellants had express notice of the existence of this agreement. It would argue a strange defect in our jurisprudence if it were necessary to go further to fix the defendants with liability. The evidence of notice is of the most cogent and convincing character; and we do not feel that we need add a single comment to the observations which his Lordship has made upon this topic.

It is further contended that the effect of the Legislature legalizing the lease is to exempt the Great Western Railway Co. from this liability, although it had full notice. We have not observed any indication of intention to sanction such an injustice. The particular enactment relied upon in the argument, viz., 36 Vic. c. 82, s. 1, certainly lends it no countenance. Upon the whole it seems to us to be beyond doubt that the appellants are bound to perform the agreement in question, and that they deliberately attempted to break it, because its continued fulfilment was not profitable.

The plaintiffs therefore were entitled to a decree with costs. But the decree as drawn has gone beyond the necessities of the case, and imposed upon the appellants onerous obligations without any corresponding benefit to the respondents. For example, it can serve no useful purpose to require them to stop every ordinary freight train at Gowanstown. Nor is it reasonable to require them to stop every passenger train, including through trains. The most that can be expected is that they shall stop the trains that are usually stopped at ordinary stations. We do not deem it necessary or expedient to aim at any more precise definition of what should be done by the defendants. The decree should declare that the defendants, the Great West-

ern Railway Co., are bound to maintain a permanent freight and passenger station at Gowanstown, and award an injunction restraining them from ceasing so to use it. We do not think, on the appeal book as it stands, we are called upon to consider whether the demurrer of the Wellington, Grey, and Bruce Railway Co. was properly allowed. Under the circumstances we give no costs of the appeal to any of the parties. The other costs must be paid as directed by the decree appealed from.

Appeal dismissed.

TYLEE ET AL. V. HINTON.

Mortgage payable by instalments—Covenant to pay the whole on default—Equitable plea—Effect of joining issue thereon.

Upon default in payment of an instalment in a mortgage, the mortgagees sued for the whole amount of the mortgage money. The mortgage purported to be under the Act respecting short forms of mortgages, 27 & 28 Vic. ch. 31, but number 16 of the second schedule was omitted; and it contained a covenant (not following the statutory form) that on default in the payment of any one instalment or any part thereof, the whole unpaid principal and interest should immediately become due, and that he (the mortgagor) would pay the same forthwith should the mortgagees so require, without demand.

The defendant paid into Court the amount actually due for the instalment of principal and interest, and pleaded, on equitable grounds, that the residue, \$12,500, was the balance of the purchase money of land bought by him from the plaintiffs for \$14,000, of which defendant had paid \$1,500; and that the sum claimed above that paid into Court was claimed only by way of forfeiture for the default; and he prayed for relief from such forfeiture and for a stay of proceedings. Upon this plea issue was joined; and at the trial the mortgage was put in and all the facts alleged in the plea were proved.

Held, in the Court of Queen's Bench, WILSON, J., dissenting, that such relief might be granted under G. O. 461, which is not confined to suits for foreclosure, and a verdict was entered for defendant.

Held, in this Court, affirming that judgment without deciding whether G. O. 461, applied to suits for redemption or entitled the defendant to relief in an action at law on the mortgage—that the defendant was entitled to succeed, on the ground that the equitable plea, upon which the plaintiffs had chosen to join issue, had been proved, and no amendment having been asked for, the defendant was strictly entitled to a verdict.

Remarks as to the lax system of pleading frequently adopted in joining issue, when the question is really one of law.

Quære, per Moss, C. J. A., whether the Court of Chancery has power to grant relief in such a case, either by virtue of G. O. 461, or its inherent jurisdiction to relieve against penalties or forfeitures.

This was an appeal from a judgment of the Court of Queen's Bench, making absolute a rule *nisi* to enter a verdict for the defendant, reported 42 U. C. R. 228.

The declaration stated that the defendant, by deed bearing date 16th September, 1876, covenanted with the plaintiffs to pay them the sum of \$12,500, with interest at seven per cent. from 12th of August, 1876: the principal in ten equal annual instalments of \$1,250 each, payable with interest on the whole unpaid principal on the 12th day of August in each year: that it was provided in and by the said deed that if default should be made in the payment, the whole unpaid principal money, together with

all interest thereon, should, at the option of the plaintiffs, become immediately due and payable as if the time for the payment of the principal money had fully come and expired ; and that the defendant had covenanted with the plaintiffs that in the event of such default in payment of any one instalment, or any part thereof, he would pay the principal money then remaining unpaid, and interest, forthwith after making such default, should the plaintiffs so require (without demand). It was then averred that the defendant did not pay the instalment of \$1,250 which fell due on the 12th of August, 1877, or any part thereof, or the interest, whereby the whole principal sum became immediately payable. The claim was for the whole \$12,500, and interest from 12th August, 1876.

The defendant paid into Court the overdue instalment and interest, and as to the residue he pleaded, on equitable grounds, that the sum of \$12,500 was the balance of a sum of \$14,000, the purchase money of land bought by the defendant from the plaintiffs, of which the defendant had paid \$1,500, and had given to the plaintiffs the deed in the declaration mentioned by way of mortgage, securing upon the land the balance of the purchase money, being the \$12,500 ; and that the moneys claimed over and above the amount paid into Court were so claimed only by way of forfeiture for the non-payment of the said principal and interest moneys which were now paid into Court ; and he prayed to be relieved from the forfeiture, and that proceedings might be stayed until further default (if any) should happen to be made.

Upon this plea issue was joined.

At the trial before Burton, J. A., the mortgage was produced, and evidence was given proving all the facts alleged in the plea.

Counsel for the defendant then contended that he was entitled to succeed on the issue, and that if the plaintiffs had desired to raise the question of forfeiture, they should have demurred.

The learned Judge stated that he thought the question

was, whether the parties had not contracted for the payment of a larger sum in a certain contingency; and that his construction of the covenant was, that it was a contract to pay that larger sum upon the contingency that had occurred.

Counsel then proceeded to discuss the question whether the contract was not one against which equity would relieve.

The learned Judge considered the agreement binding, and entered a verdict for the plaintiff for the full amount claimed.

The defendant moved against the verdict as being contrary to law and evidence, and on the equitable rule for which he contended.

A majority of the Court of Queen's Bench held the defendant entitled to relief, and the plaintiffs appealed from that decision.

The case was argued on the 7th March, 1878 (*a*).

Richards, Q. C., for the appellant. The cases upon which the judgment of the Court below was rested were cases of foreclosure suits, which do not apply to such a case as the present. On the respondent's failure to pay the instalment in question, the whole amount became payable, not by way of forfeiture or penalty, but in accordance with the express agreement of the parties, and under such circumstances a Court of Equity has no power to stay the proceedings. The case of *Sterne v. Beck*, 8 L. T. N. S. 588, 1 DeG. J. & S. 595, substantially overrules *Knapp v. Cameron*, 6 Gr. 559. The G. O. 461, so strongly relied on by the respondent, cannot assist him, as it only applies to foreclosure suits. But even if it does extend to other cases, it is only available on paying into Court the amount of principal and interest which is due according to the agreement of the parties, which in the present case is the whole of the principal money and interest, and not merely the overdue instalment. At any rate it only extends to cases where the suit is against the

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mortgaged property, and does not apply to a personal action on the covenant. He referred to the *Trust & Loan Co. v. Drennan*, 16 C. P. 321; *Northey v. Trumehiser*, 30 U. C. R. 426; *Ford v. Chesterfield*, 19 Beav. 428; *Thompson v. Hudson*, L. R. 4 E. & I. App. 1; *Boland v. McCarroll*, 38 U. C. R. 487; *Praed v. Hull*, 1 S. & S. 331; *Carlton v. Kenealey*, 12 M. & W. 139; *Goodtitle v. Notitle*, 11 Moo. 491; *Cameron v. McRae*, 3 Gr. 311; *Fisher on Mortgages*, 3rd ed., secs. 511-524, 525.

Beaty, Q. C., (with him *J. C. Hamilton*), for the respondents. The authorities all shew that the spirit and equity of G. O. 462, extends to redemption as well as other suits, and that it is not confined to foreclosure suits: *Moore v. Merrit*, 6 Gr. 550; *Knapp v. Cameron*, 6 Gr. 559; *McLaren v. Miller*, 20 Gr. 637; *Dornyn v. Fralick*, 21 Gr. 191. This is clearly a penalty, since it calls in ten yearly instalments at once, and we are entitled to ask the interference of the Court of Equity under its general jurisdiction and practice to relieve against the accelerated payments as against a penalty, compensation being made in payment of the debt, interest and costs. In *Sterne v. Beck* and *Thompson v. Hudson*, referred to for the appellant, the indulgence was given, or a change in the status of the parties was made, on the express agreement that in case of default the original rights were to be restored to the party granting the indulgence. In this case, however, no extended time was given, or any indulgence, but a larger sum of money was made payable by reason of the default in payment of a smaller sum. The substantial agreement here was for payment in ten years, and the Court will not make another agreement for the parties, but will carry out the real transaction.

They referred to *Parker v. Vine Growers' Association*, 23 Gr. 179; *Wiseman v. Westland*, 1 Y. & J. 117; *Brown v. O'Dwyer*, 35 U. C. R. 354; *McDonald v. Clark*, 30 U. C. R. 307; *Davis v. Pitchers*, 24 C. P. 516; *Lee v. Lorsch*, 37 U. C. R. 262; *Davis v. Thomas*, 1 Russ. & M. 506; *Keating v. Sparrow*, 1 Ball & B. 374; *Vernon v. Stephens*, 2 P. W.

66 ; *Davis v. West*, 12 Ves. 475 ; *Moss v. Matthews*, 3 Ves. 279 ; *Sanders v. Pope*, 12 Ves. 282 ; *Forwand v. Duffield*, 3 Atk. 555 ; *Dimrech v. Corlett*, 12 Moo. P. C. 199 ; *Strode v. Parker*, 2 Vernon 316 ; *Taylor's Orders*, 336 & 337 ; *Stephen's Comm.*, vol. 2nd ed., 18, pp. 112 & 113 ; *Snell's Eq.* 2nd ed. 280 ; *Taylor's Eq. Jur.*, p. 460, sec. 1105 ; *Fisher on Mort.* p. 275 ; *Smith's Mer. Law*, 4th ed., 292 ; 27 & 28 Vic. chap. 31, sec. 1-3, & sub-sec. ; 7 Geo. 2, Chap. 20.

June 25th, 1878. PATTERSON, J. A. (a).—We can only properly deal with the case upon this record by dismissing the appeal.

The issue raised is one of fact.

The plaintiff claims \$12,500, being a sum secured by a covenant under which it was payable in ten annual instalments, only one of which is overdue, unless the defendant made any default in payment, in which case the whole was to become due. The whole amount is claimed because the first instalment was not paid at the day.

To this demand the defendant says, "I bring into Court the overdue instalment, and say that it is contrary to equity to enforce the forfeiture by which the payment of the rest has been accelerated, because the \$12,500 was the balance of \$14,000 which I agreed to pay for land, and which was secured upon the land by the deed which contains the covenant declared upon." The plaintiffs meet this only by denying that the money was purchase money, and that it was secured by mortgage on the land.

The pleadings are distinct and precise. The issue is clearly raised. The counsel for the defendant has both at *Nisi Prius* and by his rule *nisi* insisted on his undoubted right to have the case disposed of on the issues. We cannot deprive him of that right. We should be doing what would be unwarranted by principle, and would be in the face of the evidence, if we gave the plaintiffs a *postea* setting out that the jury, sworn to try the

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issues, upon their oath say that the money was not the purchase money of land, or that it was not secured by a mortgage on the land; and yet without such a *postea*, or an equivalent entry of the Judge's verdict, there could be no judgment for the plaintiff which would not shew error on the record.

Whether in aid of a demand which had substantial justice to support it, the Court might not, under the present liberal practice, at the plaintiffs' request and upon proper terms, so amend the record as to raise upon it an issue in law, is not a matter now before us, because no amendment has been asked for, and it might be considered that justice did not require it to be made.

It was pointed out soon after the Common Law Procedure Act had relaxed the strictness of the old system of pleading, that the tendency would be to too great laxity.

Thus in *Hill v. Balls*, 2 H. & N. 299, Martin, B., at p. 304, spoke in 1857 of the importance of watching narrowly any departure from usual forms, "otherwise one meaning will be alleged to belong to pleadings when they are demurred to, and another when the issues joined upon them are being tried at *Nisi Prius*."

And in *Waterpark v. Fennell*, in 1859 (7 H. L. C., at p. 683, 5 Jur. N. S. 1141) Lord Wensleydale remarked that "The attainment of the desirable object of diminishing technicalities is naturally enough followed by inconvenient laxity, but may easily be, and ought to be, avoided."

Words of caution like those uttered by these eminent pleaders, which are not inappropriate to our own circumstances, are at least as apposite to the mode of stating equitable defences in actions at law as to any other part of our system of pleading.

It is too common to find in what is called a plea on equitable grounds an expanded detail of what is a defence at law; and frequently a mere statement of evidence from which it is not always easy to get hold of the point intended to be made.

The pleading before us is not open to criticism on this

score. It is clear and distinct in its statements. But it affords an opportunity for calling attention to the subject, because it is answered in the mode which in many of the cases one meets with seems to be considered by the pleader sufficient, viz., by simply joining issue in fact, when the real question may be one of law.

I have had many cases before me in which the pleader has introduced into his equitable plea so many details or embellishments or *gravamina* which he could not prove, that the plaintiff must have felt perfectly safe in joining issue. In such cases the plea not being, as it was in the case before us, fully proved, the question not infrequently arises, whether enough has been proved to sustain the asserted equity; and so, in an indirect and inartificial way, the question of law comes to be decided upon an issue of fact.

That, of course, is an accidental result, and the present case shows the danger of depending on it.

In my judgment the defendant must succeed, whatever may be the correct view of the legal questions discussed in the judgments delivered in the Court below.

As the case comes before us, a rule has been made absolute to enter a verdict for the defendant upon his second plea.

I think that on the pleadings and evidence that verdict is right, and therefore the appeal must be dismissed with costs.

Moss, C. J. A.—I am prepared to concur in the judgment that the appeal ought to be dismissed, on the ground that the facts alleged in the equitable plea, upon which the plaintiffs chose to join issue, were proved, and that therefore in strictness the verdict should have been entered at *Nisi Prius* for the defendant.

In that view it is unnecessary to say whether the plea discloses any defence. But I wish to guard myself against the appearance of assenting to the proposition that the general order of the Court of Chancery, 461, is applic-

able to suits for redemption, or would entitle the defendant to relief in an action at law upon the mortgage. If it is a part of the bargain made upon a sale of lands that the unpaid balance of the purchase money shall be secured by a mortgage providing for payment by instalments if these payments are made punctually, but accelerating the payment in the event of default, I am not at present able to perceive that the Court of Chancery could, either by virtue of the General Order or its inherent jurisdiction to relieve against penalties or forfeitures, restrain the vendor from insisting upon payment in full upon default being made. But I prefer not to express any positive opinion upon the question, and simply desire to reserve to myself full freedom of consideration, if in any other case it should become necessary to decide it.

It may be that our decision will serve to direct the attention of the profession to the danger of following the practice, now too prevalent, of blindly joining issue upon any statement which professes to be an equitable pleading

MORRISON, J. A., and BLAKE, V. C., concurred.

Appeal dismissed.

OSTROM V. PALMER.

Estate tail—"Consent" of protector—R. S. O. ch. 100, sec. 31.

The express consent of the protector to the settlement is not necessary to bar an estate tail.

The tenants in tail and the mother, who was protector to the settlement, having an estate during widowhood in the land, joined in a mortgage in fee, purporting to be made under the Act respecting short forms of mortgages, and containing the usual covenants, for the purpose of securing moneys borrowed to pay off legacies charged on the whole estate, including the mother's interest therein.

Held, reversing the judgment of PROUDFOOT, V. C., that her consent sufficiently appeared, and that the estate tail was barred.

THIS was an appeal from a decree of Proudfoot V. C.

On the 26th May, 1875, Thomas Archer made his will, and thereby devised and bequeathed "to my daughters Caroline Augusta, and Maria Theresa, all my real and personal estate; and in case of their death, or the death of either of them, without lawful issue, then I devise the same to the residue of my children, share and share alike. I hereby devise to my beloved wife, so long as she shall remain my widow and unmarried, the farm I now reside on, together with the use of my personal property, to carry on the said farm, and apply the produce of said farm in maintaining and supporting my said two daughters Caroline Augusta and Maria Theresa, until they arrive at the age of twenty-one years. I hereby devise to my daughters Catherine Ostrom, Sarah Emily Pretty, and Arabella Rebecca Burley, the sum of £50 each, to be paid to them as soon as Maria Theresa shall come of age, and payment to my said daughter Sarah Emily is to be made two years after my said daughter becomes of age; the payment to my said daughter Arabella Rebecca after my said youngest daughter becomes of age. And I hereby charge the payment of said legacies on my real estate."

Caroline Augusta, after becoming of age, in 1875, married, and after issuing a disentailing assurance, died June 20, 1877, leaving issue. Maria Theresa attained twenty-one, and died unmarried in 1876.

On the 13th May, 1876, the widow, Elizabeth Ann

Archer, Caroline Augusta, and her husband, and Maria Theresa, executed a mortgage in favour of the defendant John Palmer, securing \$400 and interest, this sum being raised to apply in payment of the legacies.

The mortgage purported to be executed in pursuance of the Act respecting short forms of mortgage, and contained a covenant on the part of Elizabeth Ann Archer that she had a good title in fee simple to the said lands: that she had a right to convey the said lands; and that the mortgagee should have quiet possession of the said lands free from all incumbrances.

The Vice Chancellor decided that in order to bar the entail under 9 Vic. ch. 11, sec. 22, the consent of the protector to the disposition of the tenant in tail must appear in express terms, and that the mortgage in question therefore did not bar the entail.

The defendants appealed.

The case was argued on the 22nd May, 1878. (a)

C. Robinson, Q. C., (with him *R. M. Wells*), for the appellant. The simple question for the decision of the Court is, whether the estate tail was converted into a fee simple by the widow, who was the protector to the settlement, joining with the tenants in tail in the mortgage. The plain object of the mortgage was to convey the fee, and she could not have expressed her consent more strongly than by joining in this conveyance, which contained a covenant that she had a right to convey the said lands. The statute does not say that the consent must be express: it merely requires her "consent." A consent may be implied by doing something which could not be done without consent. There is no doubt that a mortgage in fee by a tenant in tail bars the estate tail: *Re Laylor*, 7 P. R. 243. They referred to *Sugden on Powers*, 8th ed. 252; *Montefiore v. Browne*, 7 H. L. 241; *Williams on Real Property*, 8th ed., 50-51; *Tufnel v. Borrell*, 20 Eq.

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194; *In re Thurston and the Corporation of Verulam*, 25 C. P. 593; *Bettison v. Farrington*, 3 P. W. 362; *Burns v. McAdam*, 24 U. C. R. 449; *Davidson's* Precedents and Forms in Conveyancing, vol. ii. 1292, note *a*; *Hayes* on Conveyancing, 5th ed., 182; 3 & 4 Will. iv., ch. 74, sec. 72; R. S. O. ch. 100, secs. 10, 23, and 31.

Blake, Q. C., (with him *W. Cassels*,) for the respondents. The duty of the protector to the settlement must be interpreted strictly and in accordance with the legislative enactments. Under the statute, R. S. O. ch. 100, sec. 31, the express consent of the protector is necessary to have the effect of barring the entail. Inasmuch as the mortgage in question was made merely for the purpose of raising money to pay off legacies on the land which were payable during the existence of the tenancy for life, the widow, must be taken to have joined in the mortgage solely for the purpose of disposing of her limited estate, and under such circumstances her consent cannot even be implied.

June 25, 1878 (*a*). *Moss*, C. J. A., delivered the judgment of the Court.

There can be no doubt that upon the proper construction of this will, the daughters took as tenants in common in tail. The devise to the widow *durante viduitate* made her the protector of the settlement, and the question for solution consequently is, whether the mortgage made between the widow, the daughters and the husband of the married daughter, of the first part, and Palmer of the second part, was effectual to bar the entail. This instrument purports to be made in pursuance of the Act respecting short forms of mortgages, and contains the usual covenants that the mortgagors have a good title in fee simple and the right to convey. Beyond this it does not contain any consent on the part of the protector to enable the tenants in tail to dispose of the lands so as to pass the fee simple. The learned Vice-Chancellor was of

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opinion that an express consent to the disposition must appear on the face of the deed. He thought that the mortgage contains no indication of any intention to enlarge the estate of the tenants in tail.

The case seems to be one of the first impression, and none of the cases that we have seen furnish any guide to its decision. The language of the statute is, that the requisite consent shall be *given* either by the same assurance by which the disposition is effected, or by a deed distinct from the assurance. It follows, therefore, that when there is no other deed it must appear from the actual conveyance that the protector has given his consent to the disposition in fee. But except in the sense that the instrument must evidence the fact that the protector has given his consent, it is not apparent why an express consent should be pronounced necessary. It can scarcely be insisted that there is any magic in the use of the precise term, "consent." Any terms or form of words which clearly shew that the disposition in fee is being made with the consent of the protector, who executes the instrument, ought in reason to suffice. The special object of instituting the office was to deprive the tenant in tail of a settled estate, who was ordinarily the eldest son, from possessing immediately upon the attainment of his majority the uncontrolled power of absolute disposition against the will of his father, the tenant for life. It was in fact designed to aid in the maintenance of the policy by which the great families of England keep their estates in strict settlement, and was adopted by our Legislature without any reference to the special circumstances of this country. Now the main end to be secured was, that the disposition should not be without consent, and in order that there should not be questions raised as to verbal assent or acquiescence, the Act required that the consent should appear by the conveyance, or a contemporaneous deed. This was made indispensable, but nothing more. No precise form was prescribed or even suggested.

Then applying to this deed the ordinary rules of inter-

pretation, we must say that we think it beyond doubt that it shews upon its face that the consent of the protector was given. No one can doubt that as a matter of fact she did give the requisite consent. The mortgage was created to secure moneys borrowed for the express purpose of paying off legacies which were a charge upon the whole estate, including her own interest.

It is no violent presumption that she knew that the mortgagee would only advance his money upon the security of the highest estate the borrowers could convey. The three mortgagors could convey the estate absolutely, and no one can doubt that the intention, whether effectuated or not, was to pass the fee simple. With that knowledge and that intention she joined in executing the deed. The apt words were used on the part of the tenants in tail to bar the entail, and she covenanted that they had the right and full power to convey the estate absolutely, which right and power they certainly did not possess without her consent. We are of opinion, therefore, that the consent of the protector does appear on the face of the conveyance to be thereby given, and that the appeal should be allowed. The certificate will be silent on the question of costs, as to which the parties have arranged among themselves.

Appeal allowed.

BURGESS V. THE BANK OF MONTREAL.

Tax sale—Description of land—Deed by new sheriff.

The sheriff, on a sale of land for taxes in 1860, gave the purchaser a certificate of the land sold as "five acres of land to be taken from the south-west corner of the south-west quarter of lot 3, in the 11th concession of the Township of East Zorra"; but made no further description thereof. Six years afterwards a new sheriff gave a deed, describing the land particularly by metes and bounds.

Held, affirming the judgment of the Queen's Bench, 41 U. C. R. 212, that the sale was invalid, and that therefore, no land having been sold, section 155 of 32 Vic. ch. 36, O., did not apply to validate the deed.

This was an appeal from a judgment of the Court of Queen's Bench, making absolute a rule *nisi* to enter a verdict for the defendants, reported 42 U. C. R. 212. The facts are stated there, and in the judgment on this appeal.

The case was argued on the 20th May, 1878 (a).

The arguments were substantially the same as in the Court below.

The following additional authorities were referred to:—

For the appellant: *Bell v. McLean*, 18 C. P. 416.

For the respondent: *Fenton v. McWain*, 41 U. C. R. 239; *Kempt v. Parkyn*, 28 C. P. 123; *Hamilton v. Eggleton*, 22 C. P. 536; *Lount v. Walkington*, 15 Gr. 332; *Greenstreet v. Paris*, 21 Gr. 237; *Re Choate and Bletcher and the Municipality of Hope*, 16 U. C. R. 424; *Blackwell on Tax Titles*, 2nd ed., 381-383; *Nicholls v. Cumming*, 1 S. C. 435.

June 25, 1878 (a). BURTON, J. A.—The question raised upon this appeal is whether Reuben H. Carroll, the purchaser at the tax sale referred to in the pleadings, had any title under the sheriff's deed; as if that deed is invalid, there was no breach of the covenant sued on, and the verdict entered for the defendants ought not to be disturbed.

The sale relied on took place on the 9th of October, 1860. There is no evidence of what took place at the sale; but the certificate given by the then sheriff, James Carroll, was

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put in at the trial, and by that he certifies that Reuben H. Carroll has become the purchaser of five acres of land, to be taken from the south-west corner of the south-west quarter of lot 3 in the eleventh concession of East Zorra ; no further description being given.

It is difficult to understand how, under the Consol. Stat. U. C. ch. 55, sec. 137, the sheriff could, in the great majority of cases, at the time of the sale give a description of the particular parcel of land intended to be sold, and it must therefore, I should assume, have been intended to give a discretion to the sheriff to select and describe the particular part intended to be sold, and insert that in the certificate to be afterwards given.

The sheriff did not at any time during his term of office cause such description to be made, nor did he apparently do anything more than give to the purchaser the certificate to which I have referred.

This certificate shews that no defined portion of the lot had been sold, and if the deed had followed this description, it is clear that no land would have passed.

Granting that the 27 & 28 Vic. ch. 28, sec. 43, applies to this case, the only authority the sheriff would derive under it would be to convey lands previously sold by his predecessor, and it never could have been intended to vest in a person who had no knowledge of the facts or circumstances attending the sale, the power to select and describe the particular parcel of land intended to be sold, but which the sheriff conducting the sale was unable himself to effect without the aid of a surveyor, or some other assistance not available at the moment of sale.

No sale therefore having been perfected in the lifetime of the sheriff who executed the warrant, the attempt of the new sheriff (who was not the immediate successor of the sheriff who sold,) to give effect to it by arbitrarily selecting five acres which might or might not be the portion intended by the late sheriff to be sold, must be nugatory, and the deed executed by him null and void. And no sale in fact having ever been made, the deed is not validated by sec. 155 of the Assessment Act.

The judgment of the Court of Queen's Bench should therefore be affirmed, and this appeal dismissed, with costs.

PATTERSON, J. A.—The facts involved in this controversy are neither numerous nor complicated.

I shall state such of them as seem to me material, which I should not have thought it necessary to do were it not that I wish to note the various dates.

The plaintiff declares on covenants for title and for quiet enjoyment contained in a conveyance made on the 1st day of November, 1864, by the defendants to one Curtis.

The defendants are alleged to have acquired the legal estate in the land by deed, dated the 15th of February, 1856; and to have conveyed, on the 1st of November, 1864, to Curtis, by a deed which contained the covenants in question, certain lands which included the five acres which are the subject of the suit. This parcel is described in the conveyance *from* the bank, and I assume therefore it was described in the conveyance *to* the bank, as "the south-west corner of lot No. 3," with abutments shewing a rectangle of 34 chains by 15, or 51 acres.

Curtis is alleged to have conveyed the five acres to one St. Germain, who, on the 30th of November, 1867, conveyed them to the plaintiff.

The covenants are full covenants against all the world.

For breach, it is alleged that on the 9th of October, 1860, the five acres were sold for the taxes of 1854 to one Carroll, "and the said arrears of taxes were not, within the time allowed by statute in that behalf, redeemed; and all times elapsed and all things happened whereby the said Carroll acquired and had at the date of the said covenants a good title in fee to the said piece or parcel of land; and the defendants were not seized thereof as aforesaid"; and an eviction by Carroll is then averred.

There is a plea denying that taxes were in arrear and unpaid as alleged, but the contest turns on the third plea, which denies the sale to Carroll and that he had the fee as alleged.

The paper title of the plaintiff and the defendants, as set out in the declaration, was either admitted on the record or proved.

Then it was shewn that a sale for taxes had taken place on the 9th of October, 1860, at which the taxes for 1854 on the south-west quarter, or fifty acres of lot three, had to be made by a sale of a portion of that land. An entry in the official book of the then sheriff shewed that five acres had been sold to Mr. R. H. Carroll and "certificate given from southwest corner."

The certificate was produced. It bore date 9th October, 1860, and certified that Reuben H. Carroll had "become the purchaser of five acres of land to be taken from the south west corner of the south west quarter of lot three in the eleventh concession of the township of East Zorra," sold for taxes, &c., &c.

That sheriff died without having executed any deed to the purchaser, and nothing further was done until September, 1866, when the sheriff then in office (but who had also died before this suit) executed a deed reciting the sale of 1860, and conveying to Carroll a square parcel of land specifically described as commencing at the southwest angle of the lot; then northerly, following the westerly limit of the lot, seven chains and eight links; then easterly, parallel with the northerly limit of the lot, seven chains and eight links; then southerly parallel with the westerly limit of the lot, seven chains and eight links, to the southerly limit of the lot; then westerly, following the southerly limit of the lot seven chains and eight links to the place of beginning—which is said in the deed to contain five acres, but which really contains a fraction over that quantity.

This description appears to have been prepared by a surveyor on the 12th September, 1866.

Thus we have the deed, which contains the first description we have of any specific piece of land, executed six years after the tax sale and two years after the date of the defendants' covenant, and conveying more land than the sheriff professed to sell.

What, therefore, was Carroll's title when the deed was made to Curtis ?

He had a certificate shewing a sale of five acres to be taken from the south-west corner of the south-west quarter of lot 3.

From the description in the title deeds, we have seen that the south-west corner of the whole lot contained 51 acres. What the south-west corner of a quarter of it contained is beyond guessing : but from this quantity, whatever it was, five acres were to be taken.

It is perfectly obvious that, looking at this certificate, it was impossible to point to any single sod that could be said to be covered by the description, or to say that the Bank had not a good title to the whole of the land now claimed when the deed to Curtis was made.

I agree with the view urged by Mr. Becher that the sheriff could not sell an undefined five acres. By section 137 (C. S. U. C. c. 55) he was to sell so much of the land as might be sufficient to discharge the taxes and charges, selling in preference such part as he might consider it most for the advantage of the owner to sell first.

Such part as he might consider most for the advantage of the owner to sell first must be a definite part.

Until the subject of the sale was defined there could be no sale, there could only be an agreement to sell. The sheriff was to sell land, not to agree that at a future time he would sell it. There is no practical difficulty about it. A purchaser offers to pay the amount required for so many acres, and the sheriff sells him so many specific acres. It is not necessary that a survey should be made or a full description by abuttals at once made. Such a description as "ten acres measured from the north-east angle, and running one chain along the concession line for every three chains along the side line," or if the sheriff had decided that it would be most for the owner's advantage to sell only a certain width of his frontage, or only to a certain natural or other landmark, a description with reference to it, and running so far back within described limits as to

comprise the number of acres, or any such description which afforded materials for identifying the land sold and enabling a fuller description to be prepared for the conveyance, would be sufficient, and must always have been attainable.

Even the Assessment Acts of later date (29-30 Vic. ch. 53, sec. 139 ; 32 Vic. ch. 36, s. 138, O. ; R. S. O. ch. 180, sec. 137), which declare that *in offering* the land for sale it shall not be necessary to describe particularly the portion of the lot which shall be sold, but it shall be sufficient to say that he will sell so much of the lot as shall be necessary for the payment of the taxes due, only set out what must necessarily have been the course of proceeding in *offering* the land for sale under that under which the sale now in question took place.

It may be, as suggested by Mr. Justice Wilson, that under the former Act a valid sale of specific land might be effected without the certificate under sec. 140 being given, as sec. 137 points in terms to the sale of specific land. Under the later Acts, I apprehend there may also be a complete sale without the certificate, though the statutes do not so clearly indicate that to be the intention. Their provisions on the subject are that *in offering* the land, the specific parcel need not be stated ; and that *after selling* any land the treasurer shall give a certificate stating *distinctly what part* of the land and what interest therein *have been sold*. This is the same language as used in the former Act, and it necessarily means either that the sale is incomplete until the certificate ; or that before the certificate not only land has been sold, but a specific parcel, *distinctly* understood, has been sold. The certificate is to state *what part* has been sold, and also to state the quantity of land sold.

It is therefore undeniable that, whether under the earlier or the more recent form of the enactment, whatever sale is made must have been, at all events, made when the certificate has been given.

If it cannot be then *distinctly stated*, it must be because no specific part has been sold.

The deed which is to follow after a year is to be a deed of *the land* previously sold. The statutes have varied in the language used to indicate the requisites of the deed. The Consol. Stat. ch. 55, sec. 150, required a description of the land by its situation, boundaries, and quantity; thus slightly adding to the requisites of the certificate which might in any way *state distinctly* what part was sold.

The Act of 1866, 29 & 30 Vic. ch. 53, sec. 147, required the treasurer to give in all deeds for land sold a description of the part sold with sufficient certainty; and if less than a whole lot, then by such general description as may enable a surveyor to lay off the piece sold on the ground. And the Act of 1869, 32 Vic. ch. 36, sec. 146, extends these requirements to certificates as well as deeds, shewing that the tendency of the law, instead of relaxing the necessity for ascertaining the land sold, is in the other direction.

In the present case, it being clear that no land was sold, the operation of sec. 155 of the statute, 32 Vic. ch. 36, O., which validates deeds in certain cases when lands have been sold, is excluded.

For another reason the section cannot assist the plaintiff. The section makes *the deed* binding, not the sale. Even the word sale in the latter part of the section, which requires the deed to be questioned within two years *after the sale*, has been construed, and, I think, correctly construed, as meaning after the deed: *Hutchinson v. Collier*, 27 C. P. 249.

If therefore a statutory validity is claimed for the deed, and the land is taken to have passed under its force, although the previous sale had been ineffectual, that result can date only from the making of the deed in 1866, two years after the date of the covenant; and a disturbance authorized by it would not support an action upon the covenant: *Snarr v. Baldwin*, 11 C. P. 353.

It has not been attempted to support the action upon any of the covenants, on the ground that if not effectually sold the land may be still liable for the taxes of 1854; and there are obviously many formidable difficulties in the way of such a contention,—amongst others, the circum-

stance that Carroll paid the taxes in 1860, though he did not get the land that he bargained for.

I agree that the appeal must be dismissed, with costs.

MOSS, C. J. A., and MORRISON, J. A., concurred.

Appeal dismissed.

BROOKS V. CORPORATION OF HALDIMAND.

County Council—Obligation to build a bridge—Mandamus—36 Vic. c. 48, sec. 413.

Section 413 of the Municipal Act of 1873, as amended by 37 Vic. c. 16, sec. 19, O., enacts that "it shall be the duty of county councils to erect and maintain bridges over rivers forming or crossing boundary lines between two municipalities within the county."

A bridge over the Grand River, which runs between the Townships of Oneida and Seneca, erected at the Village of York by a private company, having become out of repair, was abandoned by the company. A distance of twelve miles was thus left without any bridge, and a mandamus was applied for to compel the county council to build a bridge at or near the Village of York. Contradictory affidavits were filed as to the necessity of such a bridge.

Held, reversing the judgment of the Queen's Bench, 41 U. C. R. 381, that as there were other bridges over the river, the question whether a bridge should be erected at this particular spot was a matter within the discretion of the county council, with which the Court should not interfere.

THIS was an appeal from a decision of the Court of Queen's Bench, ordering the issue of a writ of *mandamus* commanding the corporation of the county of Haldimand to erect a bridge across the Grand river at or near the village of York. The judgment is reported in 41 U. C. R. 381, where the facts are fully stated.

The case was argued on the 19th January, 1878 (*a*).

(*a*) *Present*.—MOSS, C. J. A., BURTON, PATTERSON, J. J. A., and GALT, J.

Bethune, Q. C., for the appellants.

Robinson, Q. C., (*Bell* with him,) for the respondent.

The arguments were substantially the same as in the Court below. The following additional cases were referred to :

For the appellants : *Regina v. Haldimand*, 38 U. C. R. 396 ; *Rex v. Merchant Tailors' Company*, 2 B. & A. 124 ; *The People v. The Regents of the University of Michigan*, 4 Mich. 102 ; *Heffner v. The Commonwealth*, 28 Penn. 113 ; *High* on Extraordinary Remedies, secs. 325-418-419 ; *Tapping* on Mandamus 289.

For the respondent : *Howe v. Commissioners of Crawford County*, 47 Penn. 361 ; *High* on Extraordinary Remedies, secs. 431-433 ; *R. & J.'s Dig.*, 2223.

June, 25th, 1878 (*a*). Moss, C. J. A., delivered the judgment of the Court.

The learned Chief Justice dissented from the opinion of the majority of the Court below and thought that this was not a proper case for the interference of the Court. The large number of affidavits used upon the application were carefully analyzed and their contents summarized by Mr. Justice Wilson, to whose judgment we cannot do better than refer on that part of the case. For our purpose it is sufficient to note that many persons of undoubted respectability pledged their oaths to the statement that the desired bridge would be a great benefit and convenience, and that its absence is a serious loss and inconvenience to a great number of ratepayers, especially in certain townships. On the other hand, persons whose respectability is not questioned swore, that if such a bridge were built it would be mainly used by inhabitants of the village and the vicinity only, and that its use by other ratepayers of the county would be occasional only. Although there are very different estimates of the probable cost of the structure, there can be no doubt that the financial condition of the municipality is so favourable that no serious burden would be imposed

(a) *Present*.—MOSS, C. J. A., BURTON, PATTERSON, JJ. A., and GALT, J.

upon the people. Indeed, there is no reason for supposing that if the majority of the Council were on public grounds ready to support the proposal, the mere expense would create any difficulty. The majority of the Court thought that the preponderance of testimony was in favour of the applicants' contention that it was for the public convenience and advantage that the bridge should be erected. The learned Chief Justice does not seem to have expressed any opinion upon that point, although he uses some observations which tends to shew that in his view the result of the evidence was that less than half the county was interested in the work. But he held that the Council was invested with a discretion which the Court should not assume to control. We concur in the view adopted by the Chief Justice. It appears that this subject has frequently engaged the attention of the Council. It is not suggested that the members who voted against the motion to build the bridge were influenced by corrupt motives. Local feelings and prejudices may have come into play, but it is impossible to eliminate these from any municipal controversy. We certainly think that we should not be justified in holding that the Councillors opposed to this scheme were not acting *bonâ fide*, even if the established facts led us to believe that they had taken an erroneous view. For my own part, I am not prepared to declare that they were mistaken. They have means of judging which can not be fully disclosed upon affidavits.

But our judgment is not rested upon this ground. We agree with the reasoning of the learned Chief Justice, which seems to us to place the case upon a correct footing. This is not the case of a definite act as to which the functions of the council are only ministerial. It is a matter upon which the Council after due consideration of all the circumstances is to pass its judgment. It is true that it is the duty of the County Council to erect and maintain bridges over rivers forming the boundary between two townships within the county, but the question here is, whether it is the duty of the council to erect a bridge at

or near this particular spot. Bridges have already been erected and are maintained across this river. It is therefore a question of degree whether there should be another, and in our opinion it was for the council and not for the Court to pronounce a decision. If the council have a very large discretion to exercise in such a case, as Mr. Justice Wilson concedes, we think, with the greatest respect for the opinion of that learned Judge, that it follows that no case was made out for a *mandamus*. If in face of the admitted existence of a very large discretion, and upon a balance of conflicting testimony, the Court is warranted in interfering, it seems difficult to draw a line at which jurisdiction should stop.

We think the appeal should be allowed, and the rule *nisi* discharged, without costs.

Appeal allowed.

LAWSON V. LAIDLAW ET UX.

Fol. 28 Gr. 498.

Married woman—Separate estate—Form of judgment—Execution—35 Vic. ch. 16, O.

In 1852, the defendant C. A. L. became entitled as one of her father's heirs-at-law to a share in certain real estate, and she was married in 1854, without a marriage settlement. This property, which was never taken possession of either by her or her husband, was afterwards sold under a decree for the purpose of making partition. While the purchase money was in Court, to part of which she was entitled, C. A. L., at her husband's request, joined him in making a promissory note to the plaintiff for groceries supplied to her husband, intending to pay it out of the money in Court.

Held, affirming the judgment of the County Court, that the plaintiff was entitled to recover.

Per *Patterson, J. A.*, the personal property enjoyed by a married woman under the Statutes of 1859 and 1872, is her separate property at law, to the same extent and with the same incidents as property settled to her separate use was and is in equity.

A promissory note made by a married woman for a debt of her husband is not a debt binding upon her personally either at Common Law or under the Statutes.

She may convey or charge her separate personal estate as a *feme sole* might do.

A promissory note or other general engagement derives no efficacy, as a charge or conveyance, from any thing in the Statutes, and therefore has no effect except in equity..

When a married woman who has separate property contracts a debt, she is deemed in equity to have contracted it with reference to her separate property, and intending that it shall be paid out of that property, and if she had power to dispose of that property, equity will make it liable for payment of the debt.

The property so made liable must be property with reference to which she may be supposed to have contracted, and therefore must be property to which she is entitled when the debt is incurred.

Seemle, that the above propositions apply equally to real property coming under the Act of 1872.

Form of judgment given, and remarks as to the nature of the execution. *Royal Canadian Bank v. Mitchell*, 14 Gr. 412, commented upon.

APPEAL from the County Court of York.

Declaration on a promissory note made on the 2nd of July, 1875, by the defendants, payable to the plaintiff, for \$162.04.

Plea, by the defendant C. A. Laidlaw: that when she made the note she was, and still is, the wife of the defendant John Laidlaw.

Replication: that C. A. Laidlaw was and is possessed of separate real estate in this Province, in which her husband.

has no legal or equitable interest; and that she contracted with the plaintiff, and made the note in reference to and to make her separate estate liable to be sold to pay the note, if not paid at maturity; and that the plaintiff took the note from her, relying upon the security of her separate estate to pay it.

Upon this replication the defendant joined issue.

A verdict was entered for the plaintiff.

A nonsuit was moved for, on leave reserved, on the grounds:—

1. That there was no evidence that the defendant Catherine had any separate property of any kind to rely upon to pay the debt.

2. That there was no evidence of any contract made with respect to her separate property.

3. That there was no evidence that there was any contract made in respect of any employment or business in which the said defendant was engaged on her own behalf.

The rule *nisi* also asked for a new trial, but without specifying any grounds.

The learned Judge discharged the rule, giving no reasons for his decision except that he thought the case should go to the Court of Appeal.

The facts are sufficiently stated in the judgment.

The case was argued on the 7th January, 1878 (a).

Ferguson, Q. C., for the appellant. It is submitted that the evidence does not shew that the appellant was possessed of separate estate at the time she made the note. C. S. U. C. c. 73, did not make property held by a married woman separate estate. It merely freed it from the debts of her husband; and 35 Vic. ch. 16, O., does not touch this case, as the property was acquired and the marriage took place before 1872. Nor was the note in question made with reference to her separate estate: *McCready v. Higgins*, 24 C. P. 233; *Rice v. Darling*, 1 App. R. 43. The

(a) *Present*.—MOSS, C. J. A., BURTON, PATTERSON, and MORRISON, JJ. A.

case of *Kerr v. Stripp*, 40 U. C. R. 125, cannot apply here, as in that case separate property was admitted. The respondent entirely failed to prove the replication, and he is therefore not entitled to a verdict: *Field v. McArthur*, 27 C. P. 15.

C. H. Durand, for the respondent. The property in question was clearly separate estate, and the evidence proves that the appellant intended to pay the note out of it. *Kerr v Stripp*, 40 U. C. R. 125, decides that a married woman can make herself liable on an accommodation note, where she has separate estate. *Adams v. Loomis*, 24 Gr. 242, is also strongly in our favour, as in this case the husband never had any vested rights in the property in question—but even if he had, he assented to their being bound.

June 25, 1878 (*a*). PATTERSON, J. A., delivered the judgment of the Court.

We are left to deduce the facts from the evidence reported to us, without the assistance of any specific finding by the Judge who tried the cause; and we are without any statement of the views which he may have taken of the law.

The third ground taken in the rule has found its way there without any discernible object; as it is in no way raised either by the pleadings or the evidence.

We have to consider the questions raised by the first and second grounds.

The defendant Catherine was the daughter of one Franklin Jackes, who died in 1852. He had made a will in 1840, under which it does not appear that any property had come to her.

After making the will, however, he had acquired two farms, which the Court of Chancery held not to pass under the will, but to go to thirteen heirs-at-law, of whom the defendant Catherine is one.

The defendants were married in 1854.

No part of this property was ever taken possession

of by either of them. It was recently sold under a decree in Chancery, for the purpose of making partition among the heirs. The purchase money was about \$26,000, of which part had, when the evidence was taken, been paid into Court. Of this part the defendant Catherine was entitled to receive, and during the progress of this suit had received, \$500. The rest of the purchase money had not been paid in, or had not been distributed.

It is clear that the interest of the defendant Catherine in the property was real estate which she was entitled to have, hold and enjoy, free from the debts and obligations of her husband contracted after the fourth day of May, 1859, and from his control or disposition without her consent, in as full and ample a manner as if she were *sole* and unmarried: Consol. Stat. U. C. ch. 73, sec. 2.

According to the decision in *Royal Canadian Bank v. Mitchell*, 14 Gr. 412, the doctrine of equity which enables a married woman to render her separate estate liable for the payment of a debt, would not have applied to this property, by reason of the absence of power to dispose of it without the consent of her husband. And as the property was acquired before the marriage—and the marriage itself was before 1872—the operation of the first section of the Act 35 Vic. ch. 16, O., was excluded, so far as it deprived the husband of his common law interest in the lands of his wife, as was settled by *Dingman v. Austin*, 33 U. C. R. 190.

But when the promissory note was made which is declared upon in this action, the land had been sold; and Mrs. Laidlaw had become entitled, according to the evidence before us, to money then in Court.

Her property had become personal property, so far at all events as its legal incidents and the mode by which it might be charged or disposed of were concerned.

The promissory note in question was given to the plaintiff for the amount of an account for groceries supplied to the defendant John Laidlaw for use in his family.

The plaintiff had objected to let the account run on

unless it was secured by Mrs. Laidlaw. He had, however, no communication on the subject with her. The objections were always made to the husband, who promised to procure his wife to endorse his note, or to make a joint note with him.

No express authority appears to have been given him by Mrs. Laidlaw to make any such promise on her behalf, or to pledge her credit in any way; and no communication is shewn to have been made to her pointing to her assuming any personal liability or charging her property for her husband's debt, until after the account was closed, when, at her husband's request, she joined him in making the note now in suit. When Mrs. Laidlaw made the note she intended to pay it, and expected to pay from the money to be received out of Court. From one expression in her depositions I gather that she would have paid the amount in place of making the note if she had had the money but not having then received her money, she made the note.

But though the evidence does not establish any authority expressly given by the wife to the husband to trade upon her credit, it leaves no doubt that the plaintiff supplied all or nearly all of the goods for which the debt was due in reliance upon the husband's representation that the debt would be paid or secured by the wife, and that the wife had separate property. The subsequent making of the note, and the correspondence which took place between the wife and the plaintiff after the maturity of the note, furnish ample evidence of ratification of what the husband had done or promised in her name; and afford a complete answer, if any answer is required, to the argument founded on the fact that the note was not given till after the account was closed.

We have then the two factors: the existence of personal property which belonged to the wife, and in which the husband had no interest; and the promissory note, which she intended to secure a debt to be paid out of that property. Why should not the debt be so paid?

It has been suggested rather than decided in some cases,

that there is a difference between the separate property of a married woman under our statute law and her separate property as recognized by Courts of equity apart from statute law.

I am not able to perceive any difference which affects the principle on which she is held to intend to make her property liable for her debts.

The law of the Court of Chancery is concisely explained by Lord Hatherley in *Picard v. Hime*, L. R. 5 Chy. 274, 276: "There has been much discussion as to the precise mode in which a married woman's estate could be affected by anything except actual disposition. It was strongly felt by the Court that there was great injustice in protecting a married woman and allowing her to deprive others of their property by entering into engagements which she must have known herself unable to fulfil in any other way than out of her separate estate, though the Court seems to have felt some difficulties as to the manner in which the separate estate could be reached. At one time it was held that an appointment would be inferred; but Lord Cottenham, in *Owens v. Dickenson*, Cr. & Ph. 48, disposed of that by saying that if so the creditors must take in the order of the appointments. All these theories have been given up, and the doctrine has been placed upon a sound foundation by the decision in *Johnson v. Gallagher*, 3 D. F. & J. 494. Following that doctrine, the married woman in this case must be taken in making this contract to have dealt with respect to this property, and in such a case the Court will compel her to fulfil her obligations. *

* When she, by entering into an agreement, allows the supposition to be made that she intends to perform the agreement out of her property, she creates a debt which may be recovered, not by reaching her, but by reaching her property,"

In the same case the Lord Justice Giffard summarises the law with still greater brevity, at p. 277. His words are: "As to the law of this case it is unnecessary to say anything, because in the judgment of Lord Justice Turner,

in *Johnson v. Gallagher*, everything relating to the subject is clearly laid down, and it amounts in substance to this: that a creditor having a claim against a married woman can come here and assert and enforce an equity as against her separate estate."

In *Johnson v. Gallagher*, 3 D. F. & J. 494, and also in *Picard v. Hime*, L. R. 5 Ch. 274, the married woman was living separate from her husband. That circumstance did not form one of the elements from which her liability was deduced. It was merely used as a piece of evidence aiding the conclusion that her intention was to pay the debt out of her separate property. In the former case the Lord Justice said: "She was, as I have said, living separate from her husband and had separate estate; and I think that where, under such circumstances, a married woman contracts debts, the Court is bound to impute to her the intention to deal with her separate estate, unless the contrary is clearly proved. The Court cannot impute to her the dishonesty of not intending to pay for the goods which she purchases." In the case before us the deposition of the defendant herself leaves no room for inference, as she clearly shews that she in fact had in her mind when she made the note the intention which the Court in the absence of evidence to the contrary would have imputed to her.

In *Mrs. Matthewman's Case*, L. R. 3 Eq. 781, Kindersley, V. C., says, following the doctrine in *Johnson v. Gallagher*, 3 D. F. & J. 494, "It is clearly not necessary that the contract should be in writing, because it is now admitted that if a married woman enters into a verbal contract expressly making her separate estate liable, such contract would bind it. Nor is it necessary that there should be any express reference made to the fact of their being such separate estate; for a bond or a promissory note given by a married woman, without any mention of her separate estate, has long been held sufficient to make her separate estate liable. If the circumstances are such as to lead to the conclusion that she was contracting, not for her hus-

band but for herself, in respect of her separate estate, that separate estate will be liable to satisfy the obligation."

So in *McHenry v. Davies*, L. R. 10 Eq. 88, where the debt was created by endorsing a bill of exchange, Lord Romilly said, p. 90: "Upon the simple facts that an English lady, possessed of separate property, in order to enable her agent to raise money, signs her name on a piece of paper, intimating that she will be liable to pay the amount, I am of opinion that when he has so raised the money on the faith of the credit given by the signature of her name, she cannot afterwards dispute her liability and say that she is not liable to make good the amount out of the property at her disposal."

It had been clearly established long before the case of the *Royal Canadian Bank v. Mitchell*, 14 Gr. 412, was decided, that the debt of a married woman, which was, for want of a more accurate term, sometimes said to be charged upon her property, was not so charged as to give the creditor a lien upon the property, or to prevent its alienation at any time before decree: (*Owens v. Dickenson*, Cr. & Ph. 48; *Johnson v. Gallagher*, 3 D. F. & J. 494, 7 Jur. N. S. 273.) Yet none of the cases in which that doctrine was enunciated seem to have been cited to the learned Vice-Chancellor (the present Chancellor) who decided that case.

Among the more recent dicta affirming the same doctrine is a judgment pronounced in 1876 by Sir George Jessel, upon an interlocutory motion for an injunction in the *National Provincial Bank of England v. Thomas*, 24 W. R. 1013. The remarks of the Master of the Rolls are so apposite to the general subject we are considering as to justify their quotation in full. He is reported to have said: "This is an application by the holder of a promissory note signed by a husband and wife, the wife being entitled to some separate estate under a settlement, against the wife and the trustees of the settlement, to recover the amount out of the separate estate. The plaintiff moves *ex parte* for an order to restrain the wife from dealing with

her separate property; and the ground on which he bases his application is this: that the promissory note is unpaid; and he may be entitled, if it continues unpaid, to judgment directing payment out of the separate property then belonging to the married woman—judgment in the nature of what is sometimes called equitable execution. Now, neither the special nor general engagements of a married woman have any further effect against her separate property than to give the creditor a right to be paid out of it by obtaining execution. No charge is created upon the property. He is an ordinary creditor, and as such is in the same position, with respect to his debtor's property, whether the debtor is a man or woman. I must, therefore, refuse the application."

Whether the peculiar character of the charge created by the married woman's contract, binding no part of her property, though rendering it liable to an execution, would, if it had been insisted upon in the argument of the *Royal Canadian Bank v. Mitchell*, 14 Gr. 412, have modified that part of the reasoning upon which the decision proceeded which assumed the necessity for observance of the formalities prescribed for the conveyance of the property of married women, in order to make their real estate liable for their debts, is not a matter which directly concerns us at present, as we are dealing with personal and not real estate; but the learned Chancellor, in one passage of his able and instructive judgment, uses language applicable to personal as well as real estate, which, to my apprehension, is scarcely accurate. At p. 420 he says: "The Act confers upon such property certain qualities incident to separate estate; but it withholds *that* quality which is the very foundation of the English decisions, the *jus disponendi*." I do not complain of this statement. I understand the learned Chancellor to assert, not that the *jus disponendi* is essential to the existence of separate estate—for property settled to the separate use of a married woman without power of anticipation, is clearly separate property, although she cannot dispose of it—but that the *jus*

disponendi is held to be essential to an effectual charge of the property for the married woman's debts; which proposition is indisputable. The passage then proceeds: "The principle of the decisions is that a married woman entering into a contract, having separate estate, and having as incident to it a right to dispose of it, and being not personally liable upon her contract, is presumed to contract with reference to her separate estate and to intend to charge it. But such presumption cannot arise where she cannot charge her real estate; where, even if she had done so in express terms, it would have been unavailing. It would infringe the maxim that a person cannot do indirectly that which he cannot do directly."

It would, as it strikes me, be more accurate to say that the separate property is not bound where there does not exist the power to charge it, than that the presumption of the intent to charge it cannot arise. If the intention is held to exist because the Court will not impute the dishonesty of contracting a debt without intending to pay it, there seems no sound reason for hesitating to impute that intention whenever the married woman who contracts the debt holds property to her separate use, without stopping to inquire closely into her legal power to dispose of it. The extent of the power may not be quite certain, and the property may turn out to be bound or free, as one construction of a settlement or another may happen to prevail; but, in favour of honesty, the *intention* to bind it should be presumed in all cases, unless where there was in law no power to dispose, and the married woman knew that she had no such power. I think this is in accordance with authority.

In *Tullet v. Armstrong*, 4 Beav. 319, Lord Langdale used these expressions, p. 323: "It is perfectly clear that when a woman has property settled to her separate use, she may bind that property without distinctly stating that she intends to do so. She may enter into a bond, bill, promissory note, or other obligation, which, considering her state as a married woman, could only be satisfied by means of

her separate estate, and therefore the inference is conclusive that there was an intention, and a clear one on her part that her separate estate, which would be the only means of satisfying the obligation into which she entered, should be bound. Again, I apprehend it to be clear that when a married woman having separate estate, but not knowing perfectly the nature of her interest, executes an instrument by which she plainly shews an intention to bind the interest which belongs to her, then, though she may make a mistake as to the extent of the estate vested in her, the law will say that such estate as she may have shall be bound by her own act."

Instances in which the Courts have had to decide whether the separate property of a married woman was such as could be bound by her general engagements are found in the cases of *Heatley v. Thomas*, 15 Ves. 596; *London Chartered Bank of Australia v. Lempriere*, L. R. 4 P. C. 572; and *Mayd v. Field*, L. R. 3 Ch. D. 587.

The point decided in those cases is put by Sir George Jessel, in his judgment in the last named case, in these words: "The true view seems to be this, that, for the purpose of giving effect to the general engagements of a married woman, if property is settled upon her for life, with power to dispose of it by deed or will, that is her separate property so as to be subject to her general engagements."

It will be noticed that in these cases the property was indirectly bound by the general engagements, although the married woman could only, under the terms of her settlement, have directly bound it by deed or will.

Our statutes have done for married women what was previously effected by the doctrines of equity and by the machinery of settlements and trusts, by creating or recognising the capacity to hold and enjoy property for their separate use. If the relaxation of the law stops there, and does not extend the capacity of the married woman to bind herself by a contract such as that before us, it does not

abridge her power or detract from whatever efficacy her contract possessed.

When equity construed her engagement to pay money as an undertaking that the property within her disposing power should be applied to its payment, it acted on a principle which lost none of its force when the separate property came to be recognized at law as well as in equity.

In *Chamberlain v. McDonald*, 14 Gr. 447, the questions I have discussed did not properly arise. The bill was filed in that case to obtain satisfaction out of dividends payable upon bank stock for a debt contracted by the married woman *dum sola*, and it failed for the reason, amongst others, that the remedy was at law and not in equity. Mowat, V.C., intimated an opinion, in which I understand the present Chancellor to have concurred, that personal property was by the effect of the statute subject to the disposition of the married woman, so as to be answerable for her debts, the only restriction on her power of disposal being that which referred to disposal by will; a particular in which, as afterwards decided by Strong, V.C., in *Mitchell v. Weir*, 19 Gr. 568, the express restriction imposed by the statute had the same effect as would have attended a like limitation in a declaration of trust to the separate use of a *feme covert*.

I am not aware that the opinion expressed by Mowat, V. C., has been dissented from by any of the Judges who have had to consider questions arising under the statutes.

The Act of 1872, while it gave power to the married woman to contract in certain circumstances, and to engage in certain business transactions apart from her husband, and gave her a separate right of action in respect of her separate property, and made her liable to be proceeded against separately from her husband in respect of her separate debts, engagements and torts as if she were unmarried, stopped short of enabling her to contract in all cases as a *feme sole*, as we had occasion to point out in *Darling v. Rice*, 1 App. R. 43.

It was suggested by Wilson, J., in *Wright v. Garden*, 28

U. C. R. 609, that one effect of the statute is to enable her to bind her present or future separate estate by contract.

In *Merrick v. Sherwood*, 22 C. P. 467, it was found by the jury that the contract was that the goods there in question should be paid for out of the separate estate ; and the judgment of the Court of Common Pleas proceeded upon that finding, affirming the power to make such a contract. I desire to avoid expressing an opinion upon this question beyond what the present case requires. But assuming, for argument's sake, that the power to bind the separate property is involved in the concessions of the statute, I find nothing to warrant the position that a married woman is, by anything on the face of the enactments, enabled to bind or charge her property by any instrument or mode of conveyance that would not have the effect of charging the property of a single woman or a man.

I see no middle course. We must either hold, as suggested by Wilson, J., in *Wagner v. Jefferson*, 37 U. C. R. at page 577, that the effect of the Statute of 1872, is to render the married woman's liability on her contracts one of a personal nature, not depending on her possession of a separate estate, which was the construction unsuccessfully contended for in *Darling v. Rice*; or we must read the statute as we find it, without attempting by construction to make it reach farther than its terms extend. In one of the earlier cases which arose under the Act of 1858, Draper, C. J., made use of this language:—*Kramer v. Glass*, 10 C. P. 475,—“Every provision for these purposes is a departure from the Common Law. And so far as is necessary to give these provisions full effect, we must hold the Common Law is superseded by them. But it is against principle and authority to infringe any further than is necessary for obtaining the full measure of relief or benefit the Act was intended to give.”

These words had been often cited and acted on by learned Judges, and the rule they enunciate had become recognized as that which should guide the Courts in the interpretation of the Act, when the Legislature, with the know-

ledge, as we must assume, of the express application of the general principle to this legislation, thought proper in the Act of 1872 to declare somewhat specifically the cases in which the powers and liabilities of married women were to assume new phases and enlarged dimensions. We are acting on the rule when we use caution in extending by construction the express and specific provisions of the law; and also when we make the married woman, in her legal status under the statute, responsible in equity as she was when the same status was recognised only in that jurisdiction.

The Administration of Justice Act of 1873, removed whatever necessity may before that date have seemed to exist for finding in the Act either of 1858 or 1872, a remedy at law against the property which had come to be recognised at law as belonging to the wife.

That Act provided (36 Vict. ch. 8. sec. 20,) that any person having a purely money demand may proceed for the recovery thereof by an action at law, although the plaintiff's right to recover may be an equitable one only, and no plea, demurrer or other objection on the ground that the plaintiff's proper remedy is the Court of Chancery, shall be allowed in such action; and further (sec. 8.) that the Court of law might pronounce such judgment or make such order or decree as the equitable rights of the parties should require, and as fully dispose of the rights and matters in question as a Court of Equity could do.

The conclusions to which my investigation of the subject has led me, are substantially the same arrived at in the Court of Common Pleas, and stated by Mr. Justice Gwynne in his judgment in *Field v. McArthur*, 27 C. P. 15.

I may recapitulate them thus:

1. The personal property enjoyed by a married woman under the Statutes of 1858 and 1872, is her separate property at law, to the same extent and with the same incidents as property settled to her separate use was and is in equity.

2. A promissory note made by a married woman for a

debt of her husband, is not a contract binding upon her personally either at Common Law or under the statutes.

3. She may charge or convey her separate personal estate as a *feme sole* might do.

4. A promissory note or other general engagement derives no efficacy, as a charge or conveyance, from anything in the statutes, and therefore has no effect except in equity.

5. When a married woman who has separate property contracts a debt, she is deemed, in equity, to have contracted it with reference to her separate property, and intending that it shall be paid out of that property.

6. Therefore, if she had power to dispose of her property, equity will make it liable for the payment of the debt.

7. The property so made liable must be property with reference to which she may be supposed to have contracted; and therefore must be property to which she is entitled when the debt is incurred.

I have confined these propositions to personal property, which is all that we are immediately concerned with.

I may say, however, that my present opinion is, that they equally apply to real property coming under the Act of 1872. The wife's interest in that property is as free from all control of the husband, as her interest in her personal property. It is true that the concurrence of the husband is still necessary in a conveyance, but as the debt creates no charge or lien, and affects no specific portion of land, although its effect may be to lead to a sale of it all, the law respecting conveyances appears to me inapplicable. This view is irrespective of the provision of the first section of the Act which makes the married woman liable on her contracts respecting her real estate. At present, I express no opinion as to the force of that enactment.

There remain two questions; the form of the judgment, and the nature of the execution.

As to the judgment, I agree with Mr. Justice Gwynne in the suggestion made in *Field v. McArthur*, 27 C. P. 15, that it should be a decree charging the separate estate.

Taking as a guide the form of decree in *Picard v. Hime*,

L. R. 5 Chy. 578, the judgment may be that the plaintiff do recover out of the separate property of Catherine Laidlaw, which was at the date of the promissory note, and is at the present date vested in her, or in any other person in trust for her, the sum of \$ [the amount of the note and interest], and \$ for costs taxed, making in all the sum of \$ with which sum the said separate property is hereby charged.

The question of execution may perhaps occasion embarrassment, but so it often does when the defendant is *sui juris*.

In the case of tangible property, I see no reason why the sheriff should not seize it on a *fi. fa.*; any question of ownership being decided as in ordinary cases by interpleader or otherwise.

If property is of a different sort, as money or stocks held by trustees or in the woman's own name, it may have to be reached by the process in use in equity or at law, as the case may require.

The fund at present in question being money in the Court of Chancery, may probably be obtained on petition to that Court. A late reported case, in which this kind of proceeding was resorted to, was *Claydon v. Finch*, 28 L. T. N. S. 101.

The appeal should be dismissed, with costs.

Appeal dismissed.

STANDARD BANK V. BOULTON.

Married woman—Separate estate—35 Vic. c. 16, O.

The defendant, who was married in 1852, was by virtue of her marriage settlement entitled to the legal estate for life in certain lands after the death of her husband, and during his life endorsed a promissory note made by him to secure his liability to the plaintiffs. The land had been conveyed, but ineffectually, by the trustee under the settlement to one B., and the defendant signed with her husband a declaration that such conveyance was made at their request, to enable B. to sell the land and out of the proceeds to pay first the husband's debt to the plaintiffs. B. also wrote to the plaintiffs saying that the proceeds of any sales should be so applied. A decree having been made by BLAKE, V. C., against the defendant after her husband's death to realize the amount out of such land:

Held, that such decree must be reversed for the property in question was not her separate estate within the meaning of 35 Vic. ch. 16, sec. 1, O.

Appeal from the decree of Blake, V. C.

The bill alleged that defendant was the owner of an estate of freehold in lands in the township of Moulton, and that she promised the plaintiffs in writing, for a valuable consideration, that a promissory note for \$7,290, made by her husband Henry John Boulton, and endorsed by her to the plaintiffs, should be paid out of the proceeds of her interest in those lands.

In answer the defendant alleged that she had only an equitable life estate in the lands: that they were not her separate estate; and that she did not possess any other separate estate; and submitted that she was not liable to pay the note, and that no estate of which she was possessed was liable to be charged with payment of it.

It was shewn that the defendant's husband, who had mills called the Dominion Mills, owed the plaintiffs the amount of \$7,290, which was secured by his own notes, for some of which the bank had the further security of warehouse receipts. The husband was unable to pay the notes, and it was arranged that he should give another note endorsed by his wife for the whole amount. The manager of the bank agreed to accept this, relying upon the Moulton lands, and upon the knowledge he had that the defendant's father was a man of property, as making her endorsement a security for the debt.

The statement in the bill that the defendant had a freehold estate in the lands was correct. By her marriage settlement the lands were conveyed to grantees and their heirs, to hold to the use of the intended husband until marriage; then to the use of the husband for his life; after his death to the use of the wife for her life; and after her death to the use of the children. There were children of the marriage. The marriage took place in 1852.

The note was made on the 19th August, 1875, and was payable on demand.

The grantees to uses under the settlement conveyed to a Mr. Helliwell, who was spoken of as being the existing trustee, in August, 1875; and Mr. Helliwell made a conveyance of the land to G. D. Boulton for the purpose of Mr. Boulton selling the land and applying the proceeds, first in payment of the \$7,290 and interest to the bank, and afterwards in payment of other moneys on account of the Dominion Mills, or of the defendant's husband.

This purpose was not expressed in the deed, but was set forth in the following memorandum or declaration of trust dated 20th of August, 1875, and signed by G. D. Boulton, H. J. Boulton, and the defendant:—

“It is hereby declared that the conveyance of certain lands in the Township of Moulton this day made to George D’Arcy Boulton by John Helliwell, sole surviving trustee under the marriage settlement of Henry John Boulton and Charlotte Boulton, his wife, is made to the said George D’Arcy Boulton at the request of, and with the consent of the said Henry John Boulton and Charlotte Boulton, his wife, to enable the said George D’Arcy Boulton to make sales of the said lands as, and when, and upon such terms, and at such prices as may by him be deemed expedient, and out of the proceeds of such sales to pay off the indebtedness of the said Henry John Boulton to the St. Lawrence Bank, and after such payment to apply the balance of such proceeds in payment either of the purchase money of the property known as the Royal Dominion Mills, or of any moneys now or hereafter to be paid by the said George D’Arcy Boulton for the said Henry John Boulton, or for which to be paid George D’Arcy Boulton, may now be, or

may hereafter become in any way responsible in connection with the said mill for working or otherwise."

Upon the faith of this arrangement the bank discounted the \$7,290 note.

The memorandum was handed to the bank, and G. D. Boulton on the 26th of August, addressed the following note to the President of the bank :

"DEAR SIR.—Mr. John Helliwell has at the request of my brother, Mr. H. J. Boulton, conveyed to me lots Nos. 5, 6 and 7, first range from the Grand River in the township of Moulton, and in accordance with my conversation with you some weeks ago, I now write to say that the proceeds of any sales that I may make of this property shall in the first place be applied in payment of my brother's present indebtedness to your bank, which amounts, I understand, to \$7,290, with interest at eight per cent. till paid from the 19th instant. In case sales sufficient to pay off this indebtedness have not been made within a year from this date, I will at any time thereafter, upon request of the bank offer the said lands, or such portion as may be unsold, for sale by public auction, and apply proceeds as above.

"Yours truly,

"G. D'ARCY BOULTON."

Upon attempting to make sales of this property about a year afterwards, G. D. Boulton discovered that the deed to him was null and void, owing to the absence of a consent required under the settlement.

The defendant's husband died in June, 1876.

The other facts are stated in the judgments.

The case came on for examination of witnesses and hearing at the sittings of Court at Toronto, in the autumn of 1877, when Blake, V.C., made a decree for payment by the defendant, and for sale of the interest of the defendant in the land in question, and also directed a reference as to any other lands that might be available for the satisfaction of the debt.

The defendant appealed.

The case was argued on the 12th March, 1878. (a)

C. Robinson, Q. C., and *Leith*, Q. C., for the appellant.

Irrespectively of statutory enactments, the appellant could not have charged this property, as there is nothing in the settlement which makes it her separate estate. It is quite clear that this case is not within Consol. Stat. U. C., ch. 73, which expressly disclaims any intention to deal with property in marriage settlement. Neither does 35 Vic. ch. 16 O. apply, for that Act is not retrospective, and is also carefully worded so as not to affect marriage settlements. The decisions of the Courts are uniform, that the first part of section 1 of 35 Vic. ch. 16 O., is not retrospective, except as qualified by *Adams v. Loomis*, 22 Gr. 99, 24 Gr. 248, in which it was decided that it was retrospective where vested rights are not interfered with. And the same construction should be placed upon the term real estate at the end of the section as at the beginning. But assuming that 35 Vic. ch. 16, O., does apply, *Field v. McArthur*, 27 C. P. 15, shews that the separate estate intended to be bound must be an estate in possession at the time the contract is entered into and that estates in expectancy are not within its grasp. In giving judgment in the Court below, Blake, V. C., following *Adams v. Loomis*, decided against the appellant on the ground that no vested rights were interfered with; but at the time that this contract was made, the husband had a vested interest in the lands. The appellant could not make herself liable upon her endorsement, which was solely for the accommodation of her husband, and for which she received no consideration. At any rate the Court below was wrong in making a personal order against the appellant, as it has no power to make such an order against a married woman. They referred to *Leys v. McPherson*, 17 C. P. 166; *Royal Canadian Bank v. Mitchell*, 14 Eq. 412; *Dingman v. Austin*, 33 U. C. R. 190; *Darling v. Rice*, 1 App. R. 43; *Kerr v. Stripp*, 40 U. C. R. 125, 24, Gr. 198; *Johnston v. White*, 40 U. C. R. 309; *Thomson v.*

(a) *Present*.—MOSS, C. J. A., HAGARTY, C. J. C. P., PATTERSON and MORRISON, JJ. A.

Dickson, 28 C. P. 225; *McCready v. Higgins*, 24 C. P. 233; *Story's Eq. Jur.*, 12th ed., sec. 1397; *Mitchell v. Weir*, 19 Gr. 568.

Boyd, Q. C., for the respondent. 35 Vic. ch. 16, sec. 1, O., confers upon a married woman the fullest power to deal with her separate estate so long as she does not destroy any trusts in settlement. The case of *Adams v. Loomis*, 22 Gr. 99, 24 Gr. 248, expressly decides that this Act is retrospective, except where vested rights are interfered with, and this view was concurred in by the Court of Queen's Bench in *Johnston v. White*, 40 U. C. R. 309. In this case there was no interference with vested rights, as the wife was not acting in the matter alone, but with her husband. It is well settled that a married woman has power to convey a reversionary interest in her separate property, and if the appellant could convey her interest in this property, as she undoubtedly could, she had power to charge it with the payment of this note. A wife can render her property liable as surety for her husband: *Kerr v. Stripp*, 40 U. C. R. 125, 24 Gr. 198; *Mayo v. Hutchinson*, 57 Me. 546; *Winans v. Peebles*, 31 Barb. 371. The evidence shews that the appellant knew that valuable securities were being given up by the respondent in consideration of her endorsement and charge upon this property, which was a sufficient consideration for her promise. The Court was right in making a personal order against the appellant: *Stead v. Nelson*, 2 Beav. 245. He referred to *Sturgis v. Corp*, 13 Ves. 190; *Headen v. Rosher*, McL. & Y. 89; *Crofts v. Middleton*, 2 K. & J. 194; 8 De G. M. & G. 192; *Dingman v. Austin*, 22 C. P. 467; *Mayd v. Field*, 24 W. R. 660; *Bishop*, on Married Women, 1st Vol., secs. 84, 85, 2nd Vol., secs. 211, 227, 204, 1st ed.

June 27, 1878 (a). Moss, C. J. A.—The able arguments addressed to us at the bar have reduced this controversy to comparatively narrow limits. Mr. Boyd very properly

(a) *Present*.—MOSS, C. J. A.. HAGARTY, C. J. C. P., PATTERSON, and MORRISON, JJ. A.

conceded that the plaintiff's title to relief must depend upon the Married Women's Property Act of 1872. Whatever differences of opinion there might appear to be upon some of the questions that have been raised under the Statute of 1859, it is quite clear from the whole course of decision that the plaintiff's claim cannot be supported by force of that legislation. The only part of the Act of 1872 which seems to affect the case is the concluding branch of the first section, the whole of which is in the form of a single sentence. The language referred to is: "And any married woman shall be liable on any contract made by her respecting her real estate, as if she were a *feme sole*."

Now, I think that her joining in the declaration intended to empower G. D'Arcy Boulton to sell the Moulton lands would, if she were a *feme sole*, constitute a valid charge in equity on whatever interest she had in these lands. This is, therefore, a contract respecting real estate in which she had an interest. The question then arises whether it is her real estate within the meaning of that enactment. I agree with the contention that the expression "real estate" ought to receive the same construction throughout the section. It would be extremely incongruous to assign two different senses to it in the same sentence, or to hold that in the first part of the sentence it was descriptive of certain kinds of property, and in the second part of all estates and interests which a married woman could possibly hold. With respect to one very familiar species of estate, namely, her separate estate as created by the rules of equity, such legislation was wholly unnecessary, for that was already the law. The controversy is now narrowed to this point: Does the real estate with which this section is dealing extend to and include an interest or estate such as this lady was then entitled to in these lands? There is no dispute between the parties respecting the true character of her interest. The lands in question had belonged to her husband previously to marriage. By force of the antenuptial settlement the husband took the legal estate for life and she had a legal estate for life in remainder, to come into

possession upon the death of her husband. I cannot think that such an interest was within the contemplation of the Legislature, when it was passing the enactment in question.

It will be convenient to repeat the exact language of the section. "After the passing of this Act, the real estate of any married woman, which is owned by her at the time of her marriage, or acquired in any manner during her coverture, and the rents, issues and profits thereof respectively, shall, without prejudice, and subject to the trusts of any settlement affecting the same, be held and enjoyed by her for her separate use, free from any estate or claim of her husband during her lifetime, or as tenant by the curtesy, and her receipts alone shall be a discharge for any rents, issues and profits; and any married woman shall be liable on any contract made by her respecting her real estate, as if she were a *feme sole*." The whole scope of this legislation seems to be directed towards estates in which the wife had an immediate possessory interest—estates of which there were or might be rents, issues and profits—estates in which at Common Law, and but for special legislation, the husband would have an interest for life to the exclusion of the wife, and might have a tenancy by curtesy after her death. This estate belongs to a very different class, and has none of these characteristics.

No legislation was necessary to protect the wife in its enjoyment, for while the coverture lasted it was not in her possession, but her husband was the person entitled. Nor can this properly be said to be real estate owned by the defendant, or acquired by her in any manner during coverture. Her interest, such as it is, depends upon the settlement alone, and had she not survived her husband she would never have had any right to receive the rents, issues, or profits. Such an interest is within neither the language nor the spirit of the statute.

If this is not her separate estate, there is no pretence for saying that it could be bound by any attempt to charge it, unless made by deed pursuant to the statute, and indeed no such contention was raised at the bar.

It follows that the plaintiffs are without remedy upon the promissory note, for there is no proof that the defendant was possessed of any separate estate, if her interest in the Moulton lands was not of that character. It has been decided in *Darling v. Rice*, 1 App. R. 43, and other cases, that without such proof no action can be maintained.

I cannot perceive that in dismissing the plaintiffs' bill we are doing any real injustice to the bank. As far as we can gather from the evidence, there was no real consideration to the defendant for the promise on which they now insist. No money was advanced on the faith of her responsibility, and the notes being payable on demand, no extension of time appears to have been given. The evidence as to the warehouse receipts is so doubtful and vague that we can not safely found any conclusion upon it, but unless they formed a valuable security which the bank relinquished upon obtaining the charge and promissory note, the bank seems never to have changed its position in reliance upon any act of the defendant.

In my opinion the appeal should be allowed with costs, and the bill dismissed with costs.

PATTERSON, J. A.—I think the bill was not filed till 1877, but I cannot find the date from the appeal book.

The uses under the settlement being executed by force of the Statute of Uses, the husband had the legal estate for his life, and the wife the remainder for her life, which upon her husband's death became an estate for life in possession; and therefore she had when the bill was filed a legal freehold, and not merely an equitable estate for life.

The attempt to vest the lands in G. D. Boulton as trustee for the purpose of sale having proved ineffectual by reason of the misapprehension of the title, the question is whether the plaintiffs have sustained their allegation that the defendant promised the plaintiffs in writing for a valuable consideration that the note should be paid out of the proceeds of her interest in the lands, so as to entitle the plaintiffs to have that interest charged with the debt.

There can be no question of the legal sufficiency of the consideration, though there was no consideration to the defendant.

If the liability of the land depends in any way on the existence of the defendant's liability, or quasi liability, as endorser of the note, authority is not wanting for holding that the endorsement of a negotiable instrument by a married woman is an effectual mode of creating a debt which equity will enforce against her separate property. A recent instance of this occurred in *McHenry v. Davies*, L. R. 10 Eq. 88.

The remainder expectant on the death of the defendant's husband, was not separate property within the Act of 1859, (Consol. Stats. U. C., ch. 73) which did not apply when there was a marriage settlement.

I think it is also excluded from the terms and operation of the first section of the Act of 1872. That section declared that the real estate of any married woman which is owned by her at the time of her marriage, or acquired in any manner during her coverture, and the rents, issues and profits thereof respectively, shall, without prejudice and subject to the trusts of any settlement affecting the same, be held and enjoyed by her for her separate use, free from any estate or claim of her husband during her lifetime, or as tenant by the curtesy, and her receipts alone shall be a discharge for any rents, issues and profits.

I do not think that the circumstance of a marriage having taken place before 1872 would of itself in all cases exclude the operation of this section. In *Dingman v. Austin*, 33 U. C. R. 190, it was held that when, in right of a marriage which had taken place before the Act, the husband had, before the Act, acquired an interest in the lands of his wife, that interest was not divested by the Act. The soundness of that decision has never that I am aware of been questioned. It was not decided that if a woman married before 1872, should after that date acquire real estate, the section would not apply to it. I have no doubt it would apply.

This marriage was before 1872. Whatever estate the defendant had in the Moulton lands during her coverture she had before 1872. On this ground the principle which in *Dingman v. Austin* was applied to the construction of the language of the section, referring the expressions "is owned at the time of her marriage, or (is) acquired in any manner during her coverture," to future marriages or future acquisitions of property, has the same application to the circumstances of this case. The facts in *Dingman v. Austin* were such as to call attention to the necessity of closely observing the force of the language employed, for in that case a retrospective action given to the section would have deprived the husband of property which he had actually enjoyed; but the decision itself settles the construction of the language, which must prevail in all cases.

Apart from this, I am of opinion that the section does not touch estates in expectancy. Every word of it is framed to apply to estates in possession. A husband could not, at common law, have dealt with the future estate of his wife without her consent and concurrence, and it is only uttering a truism to say that neither husband or wife could have any actual enjoyment or perception of profits from such an estate. Therefore the wife required no protection in respect of her future estates. Her property in them could not be extended, and the object of the Act was "to extend the rights of property of married women."

As soon as the estate became an estate in possession, if that happened during coverture, I do not see why the Act should not apply to it, so far as the purpose of the Act is concerned. Whether an estate which was a future estate at the time of a marriage before 1872, and became an estate in possession after 1872, could be said to be real estate acquired after 1872, so as to give operation to the section, might be a question. My own opinion is, that if I am right in holding that the section does not contemplate future estates, but deals only with estates in possession, then real estate must be held to be acquired, within its meaning, when the right to the possession of it accrues, and when

for the first time the common law power of the husband to control it, becomes operative.

These suggestions are to some extent speculative as regards the present questions, but not entirely so. The concluding words of the section, which form part of the one enactment with the words I have already quoted, have to be considered, and considered in connection with the rest of the section. They are: "And any married woman shall be liable on any contract made by her respecting her real estate, as if she were a *feme sole*."

What real estate is intended? Is it her real estate generally, or only such real estate as the earlier part of the clause deals with? The reading would be an unusual one which would give a wider meaning to the words as used towards the end of the sentence, than to the same words at the beginning.

Is the married woman to have the liability of a *feme sole* upon a contract which her marriage settlement forbids? For example, is she to be liable on an agreement to sell or charge lands in violation of a restraint against anticipation? The obvious answer to this is, that the section in express terms saves the trusts of any settlement affecting the land. I agree that it does so; but that provision only extends to the concluding enactment by reading the whole section as one sentence, and confining that enactment to the same real estate dealt with at the beginning.

Therefore, as the section does not touch this land, by reason of its not having been acquired by the defendant as a married woman after the passing of the Act, and by reason of the estate being a future estate to which, in my opinion, the section does not apply, the defendant was not by the Act made liable upon her contracts respecting it as if she were a *feme sole*.

It may yet have to be decided to what class of contracts the provision of the section applies. Does it include contracts to sell or charge the land, or only those relating to its use and enjoyment. If contracts to sell are included how are they to be enforced? How is the remedy by

decree for specific performance affected by the law which requires the husband to join in the conveyance?

I allude to this for the purpose of guarding against being understood to express an opinion upon the subject, as the questions do not necessarily arise in this case, and have not been argued before us. Indeed if the contract were held to bind, the question of the remedy would be found to have lost its difficulty when the defendant became *sole* again, as in *Stead v. Nelson*, 2 Beav. 245, a contract by a married woman to charge her separate estate was enforced specifically against her after she had become a widow.

Leaving the statutes and returning to the marriage settlement, it is clear that the lands were not limited to the separate use of the defendant. So to limit lands which she was not to enjoy till after her husband's death, he having the enjoyment during his life, would have been a palpable absurdity.

Therefore, although in general a married woman may hold a reversionary interest to her separate use, and may charge it by her general engagements, or by a specific charge—*Sturgis v. Corp*, 13 Ves. 190; *Headen v. Rosher*, McL. & Y. 89; *Major v. Lamsley*, 2 Russ. & M. 355; *Donne v. Hart*, 2 R. & M. 360—in this case the remainder was not separate property to which the doctrines of equity, recognising the *jus disponendi* and the power to charge as a *feme sole*, would apply.

Thus the plaintiffs have to make out that what was done was enough to create a specific charge upon the life estate by force of the written instrument signed by the defendant, and without the help of the statutes respecting the property of married women.

That instrument contains a declaration that the land is to be sold, and the plaintiffs' debt paid out of the proceeds. It specifies, it is true, the mode in which it was intended that the sale should be carried out, viz., by means of Mr. G. D. Boulton, in whom the parties assumed that they had vested the legal estate. But the substance of the transaction as far as the plaintiffs were interested in it was, that what-

ever interest in the land was controlled by the husband and wife, should be liable for the payment of the debt; and that interest we know was the use of the land for the life of the longest liver. This was done for the purpose of procuring the extension of credit from the bank. It was communicated to the bank and acted upon, and it was followed by the letter of G. D. Boulton which I have set out, which letter was written under the express authority, and even under the written authority of the defendant and her husband, for the memorandum signed by them was ample authority to write the letter.

It appears to me that this would prove the allegations of fact contained in the bill if the defendant were competent to contract, and that the writings are abundantly sufficient to satisfy the Statute of Frauds, and that they would amount in effect to a declaration of trust in favour of the bank.

Our Statute, "The Married Woman's Real Estate Act, 1873," 36 Vic. ch. 18, now ch. 127 of the Rev. Stats. of Ont., gives power to a married woman by deed to convey her real estate, and do other acts therein specified, provided that no such conveyance, release, surrender, or extinguishment shall be valid and effectual unless the husband is a party to and executes the deed by which the same shall be effected.

Here the husband joins in the instrument, completing every requisite to an effectual charge of the land but one, namely, that there should be a deed. This being absent, and being an essential of the statutory power to convey, the Common Law incapacity remains, and opposes an insurmountable obstacle to the plaintiffs' success.

I agree that the appeal must be allowed.

HAGARTY, C.J.C.P., concurred in the grounds given by MOSS, C. J. A.

MORRISON, J.A., concurred in the judgment on the single ground that this was not, in his opinion, separate estate within the meaning of the Act of 1859, or the Act of 1872.

Appeal allowed.

McMASTER ET AL. V. KING.

Insolvent Act of 1875—Deed of composition and discharge—Estoppel.

The plaintiff sued the defendant, an insolvent, who had obtained his discharge under a deed of composition and discharge, for a debt alleged to have been contracted under such circumstances that the imprisonment of the debtor for enforcing payment is permitted by sec. 136 of the Insolvent Act, 1875.

Held, reversing the judgment of the Queen's Bench, 42 U. C. R. 409, that the plaintiffs had not precluded themselves from enforcing the claim by having proved it in the ordinary way, and not as a debt contracted by fraud; or by having taken notes made by the defendant and his sureties for the composition, and received payment of one of them.

The term "dividend from the estate" in sec. 63, includes a payment under a deed of composition and discharge.

THIS was an appeal from a judgment of the Court of Queen's Bench, reported at 42 U. C. R. 409.

The facts are fully stated there, and in the judgments on this appeal.

The case was argued on the 20th and 21st May, 1878 (*a*).

W. Macdonald, for the appellants. There was no duty cast on the appellants by section 104 of the Insolvent Act of 1875, to prove their claim in form other than that prescribed, which only requires them to state the value of their claim by reference to accounts or documents, so as to shew that the amount claimed was actually due. There are minute directions in the English Acts and our Act as to the way in which privileged claims may be proved, and the omission to make provision for such a claim as the one in question shews that such omission was designed, the reason, no doubt, being that creditors of such debts would rarely discover the facts till after proof of claim and the examination of the insolvent and his books. It cannot be held that the appellants owed any duty as to the mode of proof to the sureties, who were not then in existence. If the facts relied on to sustain this action are true, they were necessarily within the personal knowledge of the

(*a*) *Present*.—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

insolvent, and it was his duty to notify the creditors and assignee. The appellants did not waive their rights by any act subsequent to proof of their claim. The insolvent had notice that the appellants were not coming in under the discharge by the writ which they issued against him; and knowing of this and their refusal to execute the deed of composition and discharge, he should have notified the assignee of all the facts, and he cannot now be heard to plead in his own defence the omission of an alleged duty to third parties which he himself owed to such parties. The creditors must be held to have had constructive notice of the facts by the appellants not consenting to discharge. It is not alleged in the pleadings that the creditors were not notified subsequent to proof and before the discharge, and the judgment of the Court below is wrong in assuming that they had any notice. Neither the sureties nor the creditors can be prejudiced by this claim, as the suretyship is voidable if the appellants omitted any duty to them; and the composition payments are all overdue, and the creditors have received all they agreed to take. The receipt of the composition notes could at most only be an implied consent to the deed, but by section 63 an *express* consent is required, the word "express" having been introduced into the section for the purpose of preventing an implied consent being sufficient. That section throughout applies to a discharge by way of composition and discharge, and the term "dividend" in the last clause must include "composition." The words are frequently used interchangeably in the Act. Unless the last clause of sec. 63 includes payments under a deed of composition and discharge, the practical effect would be, contrary to the intention of the statute, to prevent the creditors of debts provided for in that section from ever receiving a dividend from the estate without losing their statutory advantage, because a majority could always, by carrying a composition, alter the mode of realizing the estate, and thereby confiscate the rights reserved by the section. Powers to deal with the rights of other creditors by a majority are not to be extended in-

ferentially, as the result of a distinction between a "composition" and a "dividend." The intention of the Act was to leave the insolvent after discharge to the consequences of his own fraud, because in such cases the debt, if it exist at all, does so by reason of the misconduct of the defendant, and the paramount intention of the Act is to encourage creditors to prosecute fraudulent dealing, by reserving to them (sec. 63) their original rights, and giving them additional remedies (sec. 136), while permitting them, in any event, to share equally with the other creditors, which intention would be defeated if a majority could vote away the creditor's right to a "dividend from the estate" unless he accepted such dividend in full. The plaintiffs have the right, under sec. 136, to sustain this action, irrespective of sec. 63, and payment after action of part of the debt sued for cannot in itself amount to satisfaction unless an accord be proved. Here no accord is alleged other than that implied in the receipt of the smaller sum, hence the payment on account cannot be a satisfaction; and if the accord were alleged, the satisfaction could not take place till all the composition notes were paid. The deed expressly reserves "privileged claims," in which reservation the plaintiffs' claim is included. The rejoinder is a departure from the seventh plea. He referred to the following authorities: *Hamilton v. Watson*, 12 Cl. & F. 109; *Wason v. Wareing*, 15 Beav. 151; *Cobham v. Dalton*, L. R. 10 Ch. 655-659; *Ex parte Coker*, *In re Blake*, L. R. 10 Ch. 652; *In re Deere*, L. R. 10 Ch. 658; *King v. Smith*, 19 C. P. 319; *Milhado v. Watson*, L. R. 2 C. P. D. 281; *Wilson v. Breslauwer*, L. R. 2 C. P. D. 314, 339; *Ex parte Matthews*, *Re Angel*, L. R. 10 Ch. 304; *Ex parte Carew*, *In re Carew*, L. R. 10 Ch. 308; *Ex parte Halford*, *Re Jacobs*, L. R. 19 Eq. 436; *White & Tudor's* L. C. Eq., 50-51, vol. 2; *Story's* Eq. Jur., 12th Am. ed., secs. 146, 148; *Doria* on Bankruptcy, ed. 1874, 634; 32 & 33 Vic., Imp., ch. 62, secs. 13, 15.

Geo. Kerr, jun., (*Akers* with him,) for the respondent. The appellants by proving their claim as an ordinary one, and omitting to set out its nature and the particulars

thereof, have precluded themselves from maintaining this action. It was clearly incumbent on them to prove it in such a manner that it could be properly classified by the assignee upon the insolvent's list of liabilities. The provisions which are contained in the Act with reference to privileged claims shew that it must have been intended that the nature of such a claim as this should be stated and brought to the notice of the parties interested. Under the circumstances it was the plain duty of the appellants to have refused the composition notes, and to have notified the sureties of their refusal and of their intention to enforce payment in full. It is not intended by the Act that the insolvent shall inform the assignee that a debt has been contracted by fraud; but if it were otherwise, the fact that the insolvent did not perform a duty which rested upon him does not relieve the appellants of their duty to exercise the utmost good faith to the sureties and other creditors. It was not necessary to allege want of notice to the assignee and the creditors, as the respondent in his second rejoinder alleged that the appellants proved their debt as an ordinary claim, and such proof is actual notice to all parties that the debt is an ordinary one. It is true that the sureties are not liable for any verdict that the appellants may obtain, but if the appellants are successful, their silence as to the nature of this claim works a fraud on the sureties, as the insolvent is deprived of the means to pay the composition notes. The acceptance of the composition notes clearly bars the appellants' claim. *Rooney v. Lyon*, 2 App. R. 53, decides that you cannot go behind the Judge's order, and the order in this case discharges the debts mentioned in the schedule filed by the insolvent. The case of *Re Jacobs*, L. R. 19 Eq. 436, is distinguishable, as there the debtor was not discharged till the composition was paid, while here the discharge takes effect as soon as the composition notes are accepted. The expression in section 63, "may claim and accept a dividend from the estate," applies only where an estate is finally realized and wound up by the assignee in insolvency, and

not to a composition and discharge, the object of which is to take the estate out of insolvency. The word "composition" in law, as defined by Webster, means the adjustment of a debt or avoidance of an obligation by some form of compensation agreed on between the parties, or, as defined by Wharton in his Law Lexicon, "an agreement made between an insolvent debtor and his creditors. by which the latter accept a part of their debts in satisfaction of the whole." Upon examination of the Insolvent Act of 1875 it will be found that the term "dividend" is used in a different sense from the word "composition," the former word being used where the assignee realizes and distributes the estate, and the latter where the insolvent retains the estate, and pays something to his creditors in lieu thereof. It will be observed that where the payment is under a deed of composition and discharge, it is, as in section 60, described as a "payment or instalment of the composition," but where it is out of the estate of the insolvent, it is described as a "dividend." The last clause of section 63 is not intended to include a payment under a deed of composition and discharge, otherwise it would state that it did, as the statutes require three-fourths in value and a majority in number of creditors of one hundred dollars and upwards, who have proved upon the estate actually, to consent to a deed of composition and discharge to make it valid. The policy of the bankruptcy law is to compel the small minority to come in under the terms of such deed; and if the plaintiffs did not desire to be calculated in the amount and numbers of creditors required to give validity to the deed of composition and discharge, they should not have proved their claim, or if they did prove it, should have done it in such a manner that their claim would not be taken into account in such calculation. The policy of the Act requires the utmost fair dealing on the part of creditors and all concerned, and it could never have intended that the plaintiffs should quietly accept the benefits of a composition secured by third parties, and then turn upon the insolvent and enforce payment of their debt in full under

pressure of imprisonment. The acceptance of the notes by the plaintiffs amounts to and can be pleaded as an accord and satisfaction of the original debt; and if the plaintiffs have to depend on section 136 alone for their right to succeed, such acceptance is a complete answer to their action, as they cannot approbate and reprobate at the same time. The privileged claims referred to in the Act relate to liens upon the estate, and the plaintiffs cannot be said to have a privileged claim as the term is used in the Act. The rejoinder is not a departure from the seventh plea, as it does not the less support the plea because, in addition to a reiteration of the facts disclosed in the plea, it discloses other facts unnecessary to the defence, so long as they are not inconsistent with the plea. They cited *Brine v. Great Western R. W. Co.*, 2 B. & S. 402; *Rixon v. Emary*, L. R. 3 C. P. 546; *Dixon v. Swansea Vale and Neath and Breckon Junction R. W. Co.*, L. R. 4 Q. B. 44; *Reiffenstein v. Hooper et al.*, 36 U. C. R. 295; *Norman v. Thompson*, 4 Ex. 755; *Boyd v. Hind*, 1 H. & N. 938; *Daughlish v. Tennant*, L. R. 2 Q. B. 49; *Mitchell v. Mitchell* 27 C. P. 160; *Campbell v. Im Thurn*, L. R. 1 C. P. D. 267; *Ex parte Lopez Re Lopez*, L. R. 5 Ch. D. 65; *McMaster v. King*, 42 U. C. R. 409; *Miller v. Aris*, 3 Esp. 231; *Sadler v. Jackson*, 15 Ves. 52; *Cheeseborough v. Wright*, 28 Beav. 283; *Allan v. Garrett*, 30 U. C. R. 165; *Mitchell v. Mitchell*, 27 C. P. 160; *Dredge v. Watson*, 33 U. C. R. 165; *Preston v. Hunton*, 37 U. C. R. 177; *Ex parte Lang*, 37 L. T. N. S. 449; *Kitchen v. Hawkins*, L. R. 2 C. P. 31; *Kerr on Fraud*, Am. ed., p. 127.

June 25th, 1878 (a). Moss, C. J. A.—This case presents questions of some nicety, and it is only necessary to examine the different opinions pronounced by the learned Judges in the Court below to perceive that weighty arguments can be advanced in support of either view. Upon the best consideration that I have been able to bestow, I think that

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the conclusion arrived at by Mr. Justice Wilson is correct. The plaintiffs are suing the defendant, a discharged insolvent, upon a debt alleged to have been contracted under such circumstances that imprisonment for enforcing payment is permitted by the Insolvent Act. The defendant sets up a deed of composition and discharge executed by creditors, as required by the Act, and conduct on the part of the plaintiffs, which he insists now precludes them from asserting that their claim is not barred by the discharge.

The first point presented for our consideration is, whether the plaintiffs' claim is defeated by their having proved it in the ordinary way, and not as a debt contracted by fraud, or one which would not be affected by the insolvent's discharge under the Act. It is alleged that the plaintiffs' debt was included by the defendant in his schedule as an ordinary claim, but I cannot conceive any reasonable ground for holding that this should affect the plaintiffs. It is so much a matter of course that an insolvent should refrain from stating that he had fraudulently contracted the debt, that his silence ought not to prejudice the creditor.

But the point seriously urged in this connection is, that the plaintiffs' mode of proof is fatal to their present claim. To my mind the arguments by which Mr. Justice Wilson has met this objection are simply unanswerable. In addition to them I need only refer to the judgment which my brother Burton is about to read, and which I have had the opportunity of perusing. Indeed, if this had been the only point for adjudication I should not have occupied the time of the Court by saying more than that I fully concurred in and adopted his reasons. But I am anxious to endeavour to explain succinctly the considerations which have led me to a conclusion favourable to the plaintiffs upon the other branch of the defence. That grows out of the defendant's allegation that the plaintiffs, with notice of all the facts upon which they now seek to charge the defendant, accepted the composition notes made by the defendant and by his sureties, who had agreed to become liable for him in the belief that the plaintiffs' claim was an ordinary

one, which would be discharged by force of the deed and the statute, and that one of these notes had been paid to the plaintiffs. Starting with the incontestable proposition that a creditor, who has accepted and acted upon an agreement for a composition outside of the Act, is as fully bound as if he had executed the formal instrument, the natural inclination of one's opinion is, to consider these plaintiffs estopped. That must manifestly be the result unless some solid ground of distinction can be discovered between his position under a private arrangement and under the Act.

It may serve to throw some light upon the question, if the provisions of the Act of 1869 and of the Act of 1875 be contrasted. The 99th section of the former statute enacted that a discharge without composition, whether consented to by any creditor or not, should not operate any change in the liability of any person secondarily liable. The 100th section provided that a discharge under the Act should not apply without the express consent of the creditor to any debt for enforcing the payment of which the imprisonment of the debtor is permitted by the Act. This language shewed very clearly that the provisions of the 100th section included a discharge under a deed of composition and discharge. The interpretation, which gave the word its full significance, was irresistibly suggested by the omission of the qualification "without composition." The 62nd section of the Act of 1875 is taken from the 99th section just referred to, but the words, "without composition" are omitted. Upon the plainest canons of construction the word "discharge" must be held to be used in its most general sense, and the same meaning must be assigned to the term in the 63rd section. This seems effectually to dispose of the argument that the 63rd section relates only to discharges obtained otherwise than by composition. There is a difference between the 100th section of the Act of 1869 and the 63rd section of the Act of 1875, which is deserving of note in the present controversy. The former provided that a discharge should not apply without express consent to any debt for enforcing the payment of which the

imprisonment of the debtor was permitted by the Act, nor to any debt due as damages for assault or wilful injury to the person, seduction, libel, slander, or malicious arrest, nor for the maintenance of a parent, wife, or child, or as a penalty for any offence of which the insolvent has been convicted, *unless the creditor thereof should file a claim therefor*, nor should any such discharge apply without such consent to any debt due as a balance of account from the insolvent as an assignee, tutor, curator, trustee, executor, or administrator, under a will, or under any order of Court, or as a public officer; but the creditor of any debt due as a balance of account by the insolvent as assignee, tutor, &c., might claim and receive dividend thereon from the estate without being affected by the discharge.

The debts which might be removed from the operation of the discharge were thus divided into two classes. With regard to one class the creditor lost this advantage, if he proved a claim. With regard to the other he still enjoyed it, notwithstanding proof. By the omission in the Act of 1875 of the words "*unless the creditor thereof shall file a claim therefor*," and by extending the provision as to claiming and accepting a dividend to all the debts dealt with by the section, the Legislature in the clearest manner indicated its intention that all these debts should stand on the same footing. The privilege which was formerly attached to a claim of a *cestui que trust* against his defaulting trustee was extended to a creditor in the position occupied by the present plaintiffs. Keeping this in view we approach the real question, which may be thus stated:—Is the taking of the composition notes and the receipt of payment of one of them equivalent to an *express* consent to the discharge of the insolvent from this debt? As I have already intimated, I am of opinion that it is not equivalent. If it were to be deemed a consent, it could at most be only put as one implied by law from the conduct of the plaintiffs. It cannot be said that it demonstrates that the plaintiffs' gave their actual consent, but it could merely be used as a reason for affecting them with the

same legal consequences as if they had consented in express terms.

The defendant's argument would stand absolutely without support, but for the declaration that the acceptance of a dividend *from the estate* shall not affect such a creditor. It even seems probable that if the words "from the estate" had not been employed, it would have not been deemed tenable, for the term "dividend" has so frequently been used as synonymous with the more exact expression "composition payment," that the more limited signification would scarcely have been attributed to it here. But the Insolvent Act is not a piece of legislation to which it is always safe to apply nice verbal criticisms. Its language must be interpreted to a certain extent at least with reference to ordinary commercial usage, and it is always necessary to keep prominently in view its objects and policy. I need not remark that this should never lead a Court to give a secondary meaning to language which is plain and unambiguous. Unless the language fairly admits of a proposed construction, that construction must be rejected. I do not think that it will be any departure from this rule, if a dividend from the estate be held for the purposes of this section to include a composition payment.

But it is further to be carefully borne in mind that the real argument must be, that by declaring that the acceptance of a dividend from the estate shall not affect a particular class of creditors, the Legislature has manifested an intention that they shall be affected by the acceptance of a composition. When the policy of the Act is regarded, that argument is deprived of all the weight which it might otherwise possess. It is a mere truism to say that one main purpose which the legislator dealing with the question of insolvency should keep in view, is the prevention and punishment of fraud. By the 136th section of our Act, any person who has acted in a certain manner shall be held to be guilty of fraud, and shall be liable to imprisonment for such time as the Court may order, not exceeding two years, unless the debt and

costs be sooner paid. The creditor has the right to take these proceedings after a discharge has been obtained. It does not appear to me that there is any reason for refining away the force of the words "express consent," in favour of persons who have by their own fraudulent conduct brought themselves within the grasp of these stringent provisions. I confess that I am unable to apprehend why we should hold that the plaintiffs were under any obligation to disclose to their debtor their intention of proceeding against him in the future. If he has not committed any fraud, he is fully protected by the discharge. Nor can I perceive that the plaintiffs have violated any duty they owed to the sureties. They had no part in procuring the sureties to secure the payment of the composition notes. They did nothing but prove their claim, as they had a perfect right to do, and await the course of events, as I think they had also a perfect right to do. There is no reason to suppose that they felt any anxiety to have a composition effected. For all that is alleged they may have been quite content that the estate should be wound up in the ordinary manner. At all events they would have been powerless to arrest the scheme of composition, for even if they had objected the debtor had procured a sufficiency of creditors to secure its adoption, and to force it upon the whole body.

In my judgment the plaintiffs are not precluded, either at law or in equity, from enforcing this claim; and I think that the appeal should be allowed, with costs, and judgment entered for the plaintiffs on the demurrer.

BURTON, J. A.—In this case the plaintiffs have brought an action against the defendant, an insolvent, who has obtained his discharge under a deed of composition and discharge, to recover the amount of their original debt. The declaration is upon promissory notes and the common counts. And at the end of it is an averment that the debt was fraudulently contracted within the terms of the 136th section of the Act, whereby the debtor if found guilty is liable to imprisonment.

As the plaintiffs are bound under this averment, whether traversed or not to prove the fraud charged, no inference of its truth is to be drawn for the purpose of this demurrer. The question has to be considered upon the pleadings as if this averment, which is in the nature of a suggestion, for a purpose collateral to the mere recovery of the debt, had been omitted.

To this action then upon the original debt the defendant pleads a composition and discharge executed by the defendant, and assented to by the majority in number of his creditors who have proved claims to the amount of \$100 and upwards, representing at least three-fourths in value of such claims which have been so proved, of which the plaintiffs had notice, and that the deed of composition and discharge had been duly confirmed by the proper Judge, and that the composition notes had been handed over to and accepted by the plaintiffs, one of which had been paid, and the others yet current.

The plaintiffs reply to this, that the imprisonment of the defendant is permitted in respect of the causes of action referred to, and that the plaintiffs did not consent that the discharge should apply to it. This is, perhaps, about as meagre a statement of what the plaintiffs intend to rely on, as could well be pleaded, but I suppose we must interpret it to mean that the defendant was guilty of a fraud within the meaning of section 136, and being so guilty was liable to imprisonment, and so, under section 63, a discharge under the Act did not apply without the express consent of the creditors.

To this the defendant rejoins that the plaintiffs' claim is set forth in the list in the plea mentioned as an ordinary debt, and not as a claim or debt for the enforcement of which the imprisonment of the defendant is permitted by the Insolvent Act of 1875, and the plaintiffs proved their claim against the estate in the ordinary way as an ordinary debt, and not as a debt or claim for which the defendant was liable to imprisonment, nor as a claim to which a discharge under the Act did not apply without the consent

of the defendants; and that the plaintiffs, with notice of the facts upon which they now charge that the defendant is liable to imprisonment, appeared at the first meeting of creditors and proved their claim, and voted and acted at this meeting as ordinary creditors, and that the defendant and his sureties to the composition, believing the plaintiffs' claim to be an ordinary debt, agreed to pay the composition moneys and to deliver the promissory notes given therefor, whereby the plaintiffs' claim is wholly discharged.

To this there is a demurrer.

Judgment has been given for the defendant on the demurrer, in the Court below.

1st. Because by proving their claim, without disclosing that they intended to rely on the fraud of the insolvent in contracting the debt sued for, the plaintiffs are precluded from asserting that their claim is one for the enforcing of which imprisonment is permitted.

2nd. Because the acceptance of the composition notes amounts to an election on the part of the plaintiffs to receive them in lieu of the original contract.

Upon the first point it is urged that taking sec. 104 and the form P. together, it must be held that the plaintiffs were bound to set forth in the affidavit proving their claim that they intended to proceed against the defendant under the 136th section, for the fraud alleged to have been committed in the contracting of the debt; but all that the Act requires is that the claimant should disclose the nature and particulars of the debt, language almost identical in its terms with that used in the 17th section, which requires the insolvent to furnish the assignee with a correct account of all his liabilities, direct or indirect, contingent or otherwise, indicating the *nature* and amount thereof, together with the names and residences of his creditors and the securities held by them.

What was intended by these words probably was, that such information of the character of the debt should be given as to enable the assignee to decide how to place it on the dividend sheet—whether as privileged, such as

rent, wages, &c., or as having its origin in damages for seduction, libel, or the like, or as a debt due by an assignee, executor, or trustee, so as to enable him to see whether the claim was one to be computed in cases where a consent to a discharge or the management or disposal of the estate was required.

It may possibly be equally essential that the claims of persons which may be enforced by imprisonment should be disclosed to the assignee, but it is sufficient to say in answer that in the Act no provision has been made as to them. The fact that the insolvent was guilty of a fraud in contracting the debt has nothing to do with its *nature*; it is still a debt for goods sold and delivered, even though a fraud was practised in obtaining the credit, and it can scarcely be seriously contended that the Legislature ever intended, when they required the insolvent to indicate the nature of his debts, that he should furnish evidence against himself, and state that such debts were fraudulently contracted.

If a creditor who had been defrauded took active steps in the management and disposal of the estate, or in doing other acts where a statutory majority was necessary, it is quite possible that he would be estopped from afterwards taking a proceeding subsequent to the discharge of the insolvent inconsistent with that position. He knows that if he intends to take proceedings to imprison the insolvent, his vote is not to be computed, and if he nevertheless does vote, he may be taken to have made his election and waived his right; but to say that every person who proves his claim without disclosing his intention to take such proceedings is precluded from afterwards doing so, appears to me to be quite unwarranted, either under the sections referred to, or the forms appended to the statute. He might in fact have no knowledge that he had been defrauded, or at least that he had the means of proving it, until after making his proofs.

Neither do I think there would be any obligation cast upon him to make known his intention to the other credi-

tors; the matter being one personal to himself, he would be perfectly justified in taking what he could from the estate and claiming afterwards that the discharge was void as to him. He would have no preference against the estate in insolvency; all property coming in till the insolvent had obtained his discharge would be equally divisible among all his creditors, and not until the insolvent had obtained his discharge would he have any rights different from those of the other creditors. There would therefore be no injustice to the other creditors.

If, however, as in this case, the insolvent procures the majority of the creditors to assent to a deed of composition and discharge, does any obligation arise either as to the other creditors or the persons who become security for the composition? As regards the creditors, I am unable to see what duty would be thrown upon the plaintiffs to make known their intention. It cannot in any way affect them, they receive their composition, which they have either voluntarily assented to or are compelled to accept by the acts of creditors other than the plaintiffs, and the sureties can have no just or legal cause of complaint. The plaintiffs did not induce the sureties to enter into the engagement, and they would be aware that the non-assenting creditors might possibly have been defrauded, or that some of the creditors might not have been included in the schedule, and it would be incumbent upon them to make the necessary enquiries, or if for any reason they were unable to obtain the information, they could, as they usually do, take security upon the insolvent's property.

The question, therefore, resolves itself into whether section 63, when using the words "a discharge under this Act shall not apply without the express consent of the creditor" to certain descriptions of claims, is confined to such discharges only as are obtained otherwise than by a deed of composition and discharge.

It is contended that it is so, because in the concluding portion of the section there is a provision that the creditors of any such debt may claim and accept a dividend

from the estate, without being by reason thereof in any respect affected by such discharge, and that this can only apply where an estate is finally realized and wound up by the assignee in insolvency, and not to a composition and discharge, the object of which is to take the estate out of insolvency.

I think that the plain words of the statute, "a discharge under this Act," which would include a discharge under a deed of composition and discharge, should not be thus restricted, if such a construction can be reasonably avoided, the policy of the law being to leave the insolvent to the consequences of his fraud, and to encourage creditors to prosecute fraudulent debtors, which they would be indifferent about if no such inducement were held out to them. The terms dividend and composition are frequently used interchangeably; the term composition payment is aptly used in sec. 60, whereas in other portions of the Act the term dividend would extend to compositions.

The English Act of 1869, provides that when a debtor makes any arrangement or composition with his creditors under the Act, he shall remain liable for the unpaid balance of any debt which he incurred before the date of such arrangement or composition by any fraud, provided the defrauded creditor has not assented to such arrangement or composition otherwise than by proving his debt and *receiving dividends*; it does not say, out of the estate, but it uses the same term as regards either a liquidation by arrangement or under a composition. The receiving of a dividend, or what would more accurately be described as a composition, might under the English Act be treated as an implied consent, hence the insertion of these words, but I think that the words in our own Act were introduced *ex abundanti cautela*, as the mere receipt of dividends could not be tortured into an "express consent," neither do I think that the acceptance of a dividend, it may be a very reduced dividend, which by force of the Insolvent Law and the votes of the majority of the creditors is forced upon an unwilling creditor, in the shape of a composition, can be so regarded.

Putting out of view for the moment the case of these plaintiffs, and taking some of the other cases referred to in the 63rd section, the case, for instance, of a claim for the support of a parent, wife, or child, or a debt due as trustee, the holder of such a claim would be powerless to resist an attempt to enforce an arrangement by composition, and yet according to the contention of the defendant, he would lose his statutory privilege if he accepted it; and it would thus be in the power of the majority, and practically in many cases in the power of the insolvent, to vote away the dividend of the creditor, unless he consented to accept it in full.

I quite agree with the learned Chief Justice of the Queen's Bench, that if a person, independently of the statute, accepts a benefit under a deed of composition he is bound by it as fully as if he had actually signed the deed, and very properly so; it is his voluntary act, and it would be a libel upon common sense to say that he should still be entitled to enforce his demand, because although he had accepted the substance he had omitted the mere formal matter of signing the instrument; but in a composition under the Insolvent Act he has no option, he is bound to accept the composition. He is bound by the deed and prevented from enforcing his demand, whether he accepts the composition or not, with the privilege, however, if his claim be one to which the discharge does not apply, of looking to the insolvent personally after his discharge. That is an absolute right in the case of trustees and others who have not given their "express consent" to the insolvent's discharge. It is a conditional right in the case of persons in the position of the plaintiffs—that is, if they can satisfy a jury that the fraud has been committed.

The right to enforce the debt can arise only from the fraudulent misconduct of the defendant. Is there any reason in law or morals why that right should not be enforced because the injured party has accepted a portion of his claim in the shape of a composition forced upon him instead of a dividend?

I am unable to recognize the distinction, except that I consider that a person who has been compulsorily driven to accept a composition instead of a dividend has a higher claim to consideration. The plaintiffs here have been guilty of no fraud against the insolvent, his creditors, or his sureties. They were in my judgment under no obligation to communicate their intention to take the proceedings now initiated even if they had at the time of the execution of the deed formed that conclusion. The insolvent has no right to complain, if the charge against him be true, and the sureties have themselves to blame, if they have neglected to secure themselves against loss, as they might have done.

I am not disposed to place the narrow construction upon the word dividend which has been contended for, and as this discharge was not granted with the "express consent" of the plaintiffs, I think they are entitled to succeed upon the demurrer.

In my view of the case the appeal should be allowed.

PATTERSON and MORRISON, JJ.A., concurred.

Appeal allowed.

WILSON V. GINTY.

Action by creditor against shareholder—Proof of defendant being a shareholder.

The plaintiff, a creditor of a railway company, sued the defendant as a shareholder for the amount unpaid on his shares. It appeared that the defendant had signed the stock book of the company for forty shares, but he alleged that this was done upon the faith of a verbal agreement with one L., a provisional director and chief promoter of the company, that defendant and another should receive the contract for building the road. There was no proof that the defendant had received any formal notice of the allotment of the shares, but he paid 10 per cent. thereon, because as he alleged, L. told him that he would not get the contract unless he paid it. He also attended a meeting of the shareholders, and seconded a resolution granting an allowance to the directors.

Held, affirming the judgment of the County Court, that the payment of the 10 per cent. made him a shareholder, and that he could not repudiate his liability on the ground that he had not been awarded the contract, for L. had no power to bind the company by annexing such an agreement to his subscription.

This was an appeal from the judgment of the County Court of York making absolute a rule *nisi* to enter a verdict for the plaintiff. The facts are stated in the judgment.

The case was argued on the 15th May, 1878 (a).

Ferguson, Q. C., for the appellant. The agreement at the head of the stock list, which the appellant signed, provided that he was to become a shareholder upon the allotment of the stock to him; but the evidence fails to shew any such allotment or notice thereof. The appellant swears that he never received any notice, while the secretary merely swears that he was not told not to notify him. The company could not enforce the payment of the stock, and *McCracken v. McIntyre*, 1 S. C. 479, shews that under such circumstances a creditor cannot. It was, moreover, clearly shewn that the appellant was not to be bound by his subscription unless he and Manning received a certain contract, which agreement was never carried out, and the appellant therefore did not become a shareholder. It

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is objected now for the first time that oral evidence of this agreement cannot be received; but the deed was executed in pursuance of a parol agreement, and in such a case it is well settled that oral evidence is admissible. The authorities establish that this is a good defence to the action. The payment of the ten per cent. was not a waiver of the appellant's right to have the agreement performed, inasmuch as it was not a payment on stock, but in accordance with Laidlaw's instructions for the purpose of getting the contract. Neither can any importance be attached to his attendance at a meeting of the shareholders, as he went there for the same purpose. He referred to *In re Richmond Hill Hotel Co.*, L. R. 2 Ch. 511; *In re Aldborough Hotel Co.*, *Simpson's Case*, L. R. 4 Ch. 184; *British and American Telegraph Co. v. Colson*, L. R. 6 Ex. 108; *Townsend's Case*, L. R. 13 Eq. 148; *Bullivant v. Manning*, 41 U. C. R. 517; *Harris v. Rickett*, 4 H. & N. 1; *Mason v. Brunskill*, 15 U. C. R. 300; *Mason v. Scott*, 22 Gr. 592; *Universal Ins. Co. v. Morrison*, L. R. 8 Ex. 40.

T. Kennedy, for the respondent. Everything that was necessary to constitute the appellant a shareholder was done here. He subscribed to the stock book, paid ten per cent., and attended a meeting of the shareholders, when he seconded a resolution whereby the moneys of the company were appropriated, and voted on his stock. As to his receiving no notice of the allotment, the secretary swears that the notices were printed for the purpose of being sent to shareholders who had not paid up their calls, and that he had given no directions not to send one to Ginty. If, however, any allotment was necessary, the company allotted the stock to the appellant by receiving the ten per cent. on a specified number of shares and allowing him to act as a shareholder. The learned Judge in the Court below has found as a matter of fact that there was no such agreement in reference to the stock as was attempted to be set up by the appellant. Oral evidence relating thereto was clearly inadmissible, as the contract signed by the appellant was under seal: *Cramer v. Hodgson*, 3 U. C. R. 174; *Bank of Upper*

Canada v. Boulton, 7 U. C. R. 235. Laidlaw was only a provisional director at the time that this agreement is said to have been made, and as such he had no power to bind the company. The evidence shews that Laidlaw merely promised to do all that he could to get the contract for him; and the appellant's own acts shew that he did not consider there was a binding contract. The appellant cannot now, after the rights of creditors have intervened, deny that he is a stockholder. Having once become such, he is liable to the respondent, no matter what course the company may have pursued, or what remedy he may have against the company for breach of any contract with him. He referred to *Lake Superior Navigation Co. v. Morrison*, 22 C. P. 217; *Levita's Case*, L. R. 3 Ch. 36; *Bridger's Case*, L. R. 5 Ch. 305; *Elkington's Case*, L. R. 2 Ch. 511; *Michie v. Huron & Erie Railway Co.*, 26 C. P. 566; *Port Dover Railway Co. v. Kerr*, 36 U. C. R. 437; *Rogers's Case*, L. R. 3 Ch. 633; *Harrison's Case*, L. R. 3 Ch. 633; *Shackleford's Case*, L. R. 1 Ch. 567; *Ryland v. Delisle*, L. R. 3 C. P. 17; *Oakes v. Turquand*, L. R. 2 H. L. 325.

June 25th, 1878 (a). Moss, C. J. A., delivered the judgment of the Court.

The questions on this appeal arise in a suit between a creditor and an alleged shareholder of the Toronto, Grey, and Bruce Railway Company, who contends that he does not occupy that position, or that if he does he is not liable to pay. It is shewn, however, that he paid ten per cent. upon the amount of stock allotted to him, and attended a meeting of the shareholders, at which he seconded a resolution granting an allowance to the directors. It is quite unnecessary to consider what the effect of his action at the meeting might have been, because it seems to us to be perfectly obvious that his liability was completely established by the payment of the ten per cent. Upon this point the evidence discloses this short state of facts:

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The defendant signed the book with the heading following, for forty shares :—

“We, the several firms and corporations whose names and seals are hereunto subscribed, severally and respectively agree to and with the Toronto, Grey, and Bruce Railway Company, and bind ourselves, our executors, and administrators, or successors, respectively to become holders of the capital stock of the Toronto, Grey, and Bruce Railway Company for the amount of shares (of one hundred dollars each) and amount set opposite our respective names upon the allotment by the said Company of my or our said respective shares, and severally and respectively agree to pay to the said Company ten per centum of the amount of the said shares respectively, and to pay all future calls that may be made on the said shares respectively. Provided always, that no call shall be made until sixty days shall have elapsed from the time that a previous call was made payable, and no call shall exceed ten per cent. of the amount subscribed.”

He alleges that he only signed in consequence of, and upon the faith of an agreement with Mr. George Laidlaw, the principal promoter and manager of the enterprise, that he and his partner, Mr. Manning, were to receive the contract for building the company's road. The directors, after signatures for the requisite number of shares had been obtained, directed a notification to be given of the allotment. There is no proof that this defendant ever received any formal notice that the directors had allotted to him any particular forty shares ; but that he was apprised through some channel of the allotment to him of the forty shares for which he had applied is indisputable. He explains his reason for making the payment of ten per cent. by stating that Laidlaw met him and told him that if he did not pay the ten per cent. he could not get the contract. In consequence of this statement he went to the brokers, and arranged to pay the \$400.

This appears to us to have completely and effectually made him the holder of forty shares in the capital stock of the company. It is manifest that he was then in precisely

the same position as if at the time of subscribing the book he had paid ten per cent., or at least that it is not open to him to urge that he is in any different position. He had done all that was expected of him or any other subscriber as preliminary to becoming entitled to hold shares in the enterprise.

It was, however, contended that the defendant was not liable to be sued by this creditor, because he had subscribed the book upon an agreement with the company that he and Mr. Alexander Manning should receive a contract for the construction of the railway to be built by the company, and that unless and until the contract was so awarded the defendant was not to be bound. This defence was set up by special pleas, the precise allegations of which it is unnecessary to state. The evidence upon the question sought to be raised thereby was that of Mr. Manning and the defendant's own statement. Mr. Manning said that Mr. Laidlaw pressed the defendant to take \$5,000 or \$6,000, and used this language: "If you will agree, we will agree to give you contracts by which you will make more than the amount of the stock which we ask you to subscribe." Another extract from the evidence of that gentleman is in the following terms: "He (Mr. Laidlaw) urged Ginty and myself together that if we would become stockholders he would give us the contracts for building the Toronto, Grey, and Bruce, and also the Nipissing, at that time: that we would make more money out of it than we would subscribe; and that if we did not get the contract we were not to be shareholders. It was finally agreed that we should put down our names for a certain amount of stock."

It appears that each of them did subscribe his name for a certain amount of stock. This conversation, upon which so much is built, took place upon the street. In his examination before the trial the defendant had denominated the conversation with Laidlaw an "inducement to take the stock." He gave substantially the same account of the conversation as Manning did. He said he considered that

he had not a binding contract but an honorary one with the company.

It appeared that Manning and the defendant did get the contract for building the Nipissing road, but not that for building this company's railway.

This is really the whole evidence upon which the defendant seeks to sustain his contention, that even if he became a shareholder he cannot be required by the creditors of the company to pay the amount remaining due upon his stock. The proposition is, that upon the strength of this conversation with Laidlaw, the provisional director controlling the management of the nascent company, he may now repudiate liability. We think that no support can be found for this proposition on any principle of law or justice. It is quite incorrect to say that there was any agreement between the company and the defendant affecting the mode of paying up his shares. Laidlaw cannot be treated as the equivalent of the company, however large his influence may have been. As a provisional director, he had not even the semblance of authority to annex to a subscription an agreement binding upon the company to give the subscriber a contract upon definite terms to build the company's road. With no more force can it be pretended that he could agree that if the contract was not so awarded, the subscription should be a nullity.

But in truth the conclusion to be drawn from the circumstances is, that the defendant subscribed and paid the ten per cent. not upon the faith of any valid agreement with the company, but in the confident expectation that the powerful influence of Mr. Laidlaw would, in consideration of his acceding to the application to take shares, be exerted towards securing him the contract. The evidence is entirely consistent with the view that all the defendant supposed he was gaining by taking shares was a favourable consideration for any offer he might think proper to make to build the road. It would be preposterous to assert that he became entitled to receive the contract at any sum he might choose to ask, or upon any terms he might dictate.

On the other hand, it can scarcely be urged that he seriously contemplated accepting it upon any terms the company might propose.

To assent to the defendant's contention would be to distinctly sanction the proposition that the provisional directors of such a company could procure persons to subscribe the amount of stock and pay the ten per cent requisite for complete organization by assuring each one that to him should be awarded the contract of building the road, and that where a creditor, who had dealt with the company in the belief that these persons had agreed to pay the amount of their shares, sued one after the other, he should be told that each subscription was merely conditional, and that the contract having been awarded to some other person, no one was liable. The statement carries its own refutation.

The decision of the learned Judge was perfectly right, and the appeal is dismissed, with costs.

Appeal dismissed.

VANDECAR V. THE CORPORATION OF EAST OXFORD.

By-law closing a road—Validity of—Jurisdiction to test—Omission to provide ingress and egress—Compensation—36 Vic. ch. 48, secs. 373, 422, O.

Although the Court of Chancery has power to restrain the enforcement of a by-law of doubtful validity until the applicant has had an opportunity to move in a Court of Common Law to quash it, it has no general jurisdiction to test its legal validity.

The omission in a by-law which closes up a road to provide to the lands abutting thereon some other convenient road or way of access, under sec. 422 of the Municipal Act of 1873, does not render it void, but only subject to be quashed upon application to one of the Superior Courts of Common Law within a year.

Where, therefore, a bill was filed three years after the passing of such a by-law seeking to have it declared invalid, and asking for compensation :

Held, reversing the decree of BLAKE, V.C., that the Court of Chancery had no power to interfere.

Held, also, that under section 373 the only mode of fixing the compensation was by arbitration.

At the hearing it was agreed that the corporation should keep open two rods of the old road at the north-west corner of the plaintiff's land as part of the public road, and that the plaintiff's claim to have the whole road kept open should drop ; whereupon a decree was made perpetually enjoining the defendants from closing up the two rods.

Held, that the consent could not give power to make such a decree, for under the statute the corporation could not thus deprive itself of the power to close up such road, if the public interest should so require.

THIS was an appeal from a decree of Blake, V.C., granting an injunction to compel the defendants to keep open a certain public road. The facts are stated in the judgments.

The case was argued on the 22nd May. 1878 (*a*).

Bird, for the appellants. This suit is improperly instituted to recover damages, as under the 373rd sec. of 36 Vic. ch. 48, the respondent's claim should have been determined by arbitration. At any rate we were entitled to notice in accordance with the 246th section of the Act referred to. It is however, too late now to object to the by-law, as it has become binding by reason of the lapse of time since it was finally passed; and the respondent, having been personally present at the time that it was read in the Council, and not having

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objected to it, or to any of its terms, must be taken to have consented thereto; and after the long time which has intervened since its passage and the commencement of this suit, the alteration in the situation of the parties by reason of the by-law and the public money that has in good faith been expended, it would be inequitable to give the respondent the relief he claims. The fact that after the passing of this by-law the respondent attended on the occasion when the Corporation awarded the contract to build the substituted road, and consented to accept the position of seeing that the substituted road was properly built according to contract precluded him from objecting thereafter to its sufficiency, and he must therefore be considered to have accepted it as a proper ingress and egress. The respondent is estopped by the case of *Davis v. Vandecar*, tried before Galt, J., without a jury, wherein Davis, one of the appellants, was plaintiff, and the respondent was defendant, and in which the issues, which were the same as those involved in this suit, were all determined in favour of the plaintiff therein. It is not necessary, in order to render a by-law to stop up a public road legal, that it should provide a substituted road, as there may be in existence another suitable means of ingress and egress for those whose lands abutted on the stopped-up road, or a substituted road may be provided by another by-law or resolution; moreover the compensation may be made otherwise than in money: *In re Thurston and the Corporation of Verulam*, 25 C. P. 593. It appears by the evidence that at the time the road was so stopped up he had other suitable means of ingress and egress to and from his lands and place of residence by means of the public road forming the southern boundary of his farm; and it was therefore unnecessary to provide a substituted road. Tougher, Sommerville, and Davis, were unnecessary parties. He referred to *Hodgins v. The Corporation of Huron and Bruce*, 3 E. & A. 169, 176, 185; *Barclay v. Municipality of Darlington*, 5 C. P. 432, 438; *Magrath v. The Municipality of Brock*, 13 U. C. R. 629. 633; *Montefiore v. Browne*, 7 H. L. 242.

Blake, Q. C., and *Kerr*, Q. C., for the respondents. No notice of action was necessary, as sec. 246 of 36 Vic. c. 48, does not apply. Nor is the 373rd section a bar to this suit, as we submit that the section is only directory, and that the municipality should have offered to arbitrate, which it did not do, or have taken steps to stay the proceedings herein by a summary application. The by-law was clearly void as it assumed to close up a public road, whereby the respondent was excluded from ingress and egress to and from his lands, to which there was no other convenient road or way of access, and did not provide him with one. Besides the council did not pay or offer to pay compensation to the respondent. The respondent is not barred by lapse of time or otherwise. The evidence shews that he objected to the passing of the by-law and everything done under it. We are not estopped by the judgment in *Davis v. Vandecar*, as the question in that action was one simply of possession, and the Judge who tried the case refused to enter into the question of the by-law or the legal and equitable rights of the parties, further than was necessary to determine the mere fact of possession. The appellants *Sommerville*, *Davis*, and *Tougher*, were necessary parties as they had purchased lands under the by-law, but if they were not proper parties they should have demurred to the bill. The appellants have by their submission, made at the hearing, precluded themselves from appealing from the decree based on that submission.

June 25th, 1878 (a). PATTERSON, J. A.—The lots in the Township of East Oxford are numbered from the east; number one being the lot next to the township line of Burford.

At the south of the fifth concession is the road between concessions five and six; and at the north is the road between concessions five and four.

The stage road left the concession line at the north about

(a) *Present*.—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, J.J.A.

the middle of lot three, and ran obliquely across that lot and across lots two and one, to the Burford line.

The small triangle cut off lot three belongs to the defendant Tougher; the rest of lot three to one Robert Vandecar; lot two to the defendant Sommerville; the part of lot one, north of the stage road, to the defendant Davis; and of the remainder of that lot the east half belongs to one Samuel Cawley, and the west half to the plaintiff.

The plaintiff had ingress and egress to and from his land by means of the stage road, and also by means of the concession road at the south.

On the 29th of May, 1874, the corporation of East Oxford, passed a by-law, No. 189, by which, (1) the old stage road across lots one, two, and three, was declared to be absolutely closed up and stopped as a public road or highway; (2) The road so closed was directed to be sold to the parties next adjoining whose land it was situated; or in case they refused to become purchasers at such price as the council should think reasonable, then, to any other person; and (3) A piece of land sixty-six feet wide along the east side of lot two from the concession road at the north to the south side of the old stage road, was declared to be a public road or highway, in lieu of the road or highway which was closed up by that by-law. The by-law contained the following, amongst other recitals:

“And whereas written notices of this by-law have been posted up for a period of one month previous to the passing hereof, in six of the most public places in the immediate neighborhood of the said road or highway, so to be opened as aforesaid, and of the original allowance for road, being that part of the old stage road above described, so to be stopped up as aforesaid, and duly published weekly for four successive weeks in the neighbouring municipality of the town of Woodstock, the same being the county town of the said county of Oxford, and no newspaper being published within the municipality of the township of East Oxford.

“And whereas, the said Municipal Council have heard in person whose land might be prejudicially affected by the passing of this by-law.

“And whereas, the persons who, by reason of the closing up of the said road, will be excluded from ingress and egress to and from their lands and places of residence over the same have waived all their respective rights and claims to compensation under the said Act, and to provide for the use of such persons some other convenient road or way of access to their lands or residences, the said Municipal Council have by this by-law opened the road or highway first above described, for which the parties interested have prayed, and to which they have consented and agreed.”

Sec. 425 of the Municipal Act of 1873, sub-sec. 1, gave power to the council to pass by-laws for stopping up roads; and sub-sec. 8, authorized the provision for the sale of the old road.

Sec. 422 forbade the closing up of any public road or highway, whereby any person would be excluded from ingress and egress to and from his lands and place of residence over such road, unless the council, in addition to compensation, should also provide for the use of such person some other convenient road or way of access to his said lands or place of residence; and sec. 424 provided for notice being given, and also required that before passing the by-law the council should hear in person or by counsel or attorney any one whose land might be prejudicially affected thereby, and who petitioned to be so heard.

On the face of this by-law everything appears formal and regular.

If any requisite to its validity had been wanting, or if it had been in any respect illegal, it might have been quashed on application to one of the Superior Courts of Common Law, which Courts are, by sec. 240, the appointed tribunals for that purpose; and by sec. 241, no application to quash the by-law could be entertained by any Court unless such application were made to such Court within one year from the passing of the by-law. The by-law became therefore unassailable after the 29th May, 1875.

Under its effect, the old stage road had ceased to be a public road on the 29th May, 1874, and had become liable to be sold.

In 1875 (the particular date is not given in the appeal book) the council resolved that the price per acre at which the road should be sold should be six dollars, and directed the sale of all of it except two rods at the west of lot 1. That small portion was evidently excluded from the order for sale to afford to the plaintiff access from his land to the new road.

The plaintiff was entitled to buy the south half—having a width of twenty-two feet, as I gather from the description in a deed afterwards given to Davis—of the road across his part of lot 1. This would have cost him less than \$4. He did not, however, decide to avail himself of that inexpensive way of providing for his accommodation.

In fact no part of the old road was sold until August, 1876, nor until two other by-laws had been passed, which I am about to mention.

In the meantime the position was, that the road had ceased to be a public road. It was simply a strip of land belonging to the municipality and which the corporation had power to sell; but over which neither the plaintiff nor any of the public had as individuals any rights. The plaintiff could not walk or drive over it, except by leave of the corporation, without being a trespasser. He may have used it, and probably did so, as a road; but that could have been only by sufferance and without any legal right.

This effect of the by-law is thus stated by Chief Justice Harrison in his note to sub-sec. 8 of sec. 452 (Har. Mun. Man. 436): "The statute does not require the corporation to do more than close or stop up the road allowance. They are not required to fence it in or place any physical obstruction in the way of persons using it. They only put an end to the right of using it, and consequently to all obligation on the part of any person to respect it as a highway. The selling of the road allowance is one thing; the stopping up of a road allowance is an entirely different thing. The sale is by no means necessary to the extinction of the public easement: *Johnston v. Reesor*, 10 U. C. R. 101."

The point that a road like this old stage road may be

“altered according to law,” within the meaning of sec. 404, so as to take it out of the category of highways contained in that section, without any actual physical obstruction of the road, was also decided in *Regina v. Plunkett*, 21 U. C. R. 536.

On the 28th February, 1876, the council passed a by-law (No. 205) repealing that part of No. 189 which directed the sale of the road. The plaintiff states in his bill of complaint that he induced them to pass it, by representing to the council the injury which the sale of the road would inflict upon him. The council deny this, and allege that the by-law owed its existence to a misconception of the law on their part. This by-law is confined to the repealing clause. It does not profess to re-open the road as a public road, or to give it to the plaintiff as a private road, or to give him any rights which he had not before. I confess myself unable to understand how the sale of a bit of land in which he had no rights was to inflict injury on the plaintiff, or how injury was to be averted by stopping the sale and doing nothing more.

By-law 205 had, however, but a short life, as on the 1st August, 1876, it was repealed by by-law 209, which went on to declare that the clause of 189 which authorized the sale was revived, and was to be read as though it had never been repealed.

This was promptly followed by conveyances, made on the 5th August, 1876, by which Tougher acquired the northerly half (or twenty feet) of the part of the old road which was on lot 3; Sommerville the part which crossed lot 2; and Davis the part which crossed Cawley's part of lot 1, and the north half (or twenty-two feet) of that part which crossed the plaintiff's portion of the lot as far west as the eastern limit of the land of one Karn. We are not told where this point is. I assume that it is far enough east of the line between lots 1 and 2, to leave two rods of the old road.

The portions of the old road left unsold are the south half of that part which crosses lot 3 and adjoins the land of Robert Vandecar, the plaintiff's father; and the south

half of the part across the plaintiff's land, and also so much of the north half, if any, as the limit of Karn's land excludes from Davis' purchase.

The plaintiff alleges that the three grantees have enclosed the lands conveyed to them, and that he is thereby and by the conveyances deprived of all means of egress and ingress from or to his farm by means of the old stage road. It is obvious, however, that no physical obstruction has been created to his passing from his land along the south half of the road to the new road opened on lot 2.

He further complains that he will be put to very great expense to make a road from his dwelling house to the public road on the south end of his farm, and will be compelled to travel a much greater distance to get to either Woodstock or Brantford, and that in consequence of his dwelling being built fronting on the old stage road, and the same being closed on what has always been used and considered the front of his farm, the farm has been injured in value to the amount of \$1,000 and upwards; and that if the old stage road remains stopped up and the conveyances held valid, he will be most seriously inconvenienced and the value of his land will be thereby greatly lessened.

The prayer of the bill is for a declaration, 1. That the corporation had no right or authority to pass a by-law to close up, sell, or dispose of the old stage road or any part of it, and that by-law 189 is illegal and void; 2. That the repeal of by-law 205 did not revive that portion of 189 authorizing a sale of the old road, or the authority of the corporation to sell and convey it; 3. That the conveyances are invalid; or, 4. That the road provided by by-law 189 is not a proper and convenient road; and that the corporation may be ordered and directed to furnish to the plaintiff a proper and convenient road; 5. For further relief, and that the corporation may be ordered to pay to the plaintiff compensation, and that it be referred to the Master to determine the compensation.

So far I have referred only to the facts as stated in the plaintiff's bill.

It is further shewn that the first by-law, No. 189, was passed with the knowledge of the plaintiff, who was present when it was passed, and knew its contents. He even consented to it being passed. It appears that a dispute existed between the plaintiff and Sommerville about the line between their lots. The plaintiff contended, and for anything shown to us he may have contended correctly, that Sommerville had possession of a strip of lot one; but Sommerville had had it more than twenty years, and so could not have been disturbed. They arranged their difficulty by agreeing, in the presence of the members of the Township Council, that the line fence should be moved back to the line contended for by the plaintiff, and that Sommerville should give the land for the new 66 feet road by which the defendant was to have access to his lot, and that the plaintiff should consent to the closing of the old road. No part of this is disputed by the plaintiff, if I correctly understand the evidence; but he contends that he did not agree to the obstruction or actual stopping up of that part of the old road which crossed lot one. The evidence of Mr. Pettit, the Township Clerk, was adopted by the learned Vice-Chancellor, as giving the reliable version of what occurred at the meeting of the council. He said, "To my recollection, Sommerville agreed to move his fence, and to give four rods of a road out; that is the line fence, the division road between the two; that he was to remove it and give this four rods out; and in consideration of him doing that, the understanding I had was, that the by-law might pass to close the whole road as a public road; but Vandecar did not want any fence put across lot number one; he wanted that left open, but he was willing to relieve the municipality from any liability to keep that in repair, that is, that it should be done away with as a public road."

I am not sure that I apprehend what force we are expected to attach to the plaintiff's desire to have the portion of road across lot one left unfenced. His consent to the passing of the by-law to close the road was not essential

to the validity of the by-law, although the members of the council were naturally desirous that he should be satisfied, and supposed they had satisfied him. What was actually done by the council was plain and unambiguous. The by-law was passed and the road closed as a public road. Not only was no attempt made to quash the by-law, but if any such attempt had been rested on the absence of the plaintiff's consent it would probably have been defeated by the same evidence which Pettit has now given, even if an application to overrule what was in effect an adjudication by the council after hearing the parties interested would have been entertained.

What was the legal character of that part of the old road across lot one, after the passing of the by-law, and what interest are we to understand the plaintiff as claiming in it? Was it still a public road? The by-law itself answers this in the negative. Had it become a private road for the plaintiff? The council had no power to dedicate it as a private road unless such a power is given by the provision of sec. 422, respecting some other convenient road or way of access. But the plaintiff's case is, that this portion of the road had not been so dedicated, and we see that such was the fact.

The difference between this demand and an application to quash the by-law of 1874, which closed the road, has not been made apparent to my mind. All discussion of the merits of such an application is precluded in this suit by the two provisions of secs. 240 and 241 to which I have already adverted, which designate the Common Law Courts as the tribunals to adjudicate in the matter; and forbid *any Court* to entertain such an application after a year has elapsed from the passing of the by-law.

The later by-laws, Nos. 205 and 209 do not affect any right of the plaintiff, except on the hypothesis that No. 189 is inoperative.

If that by-law effectually closed the road, the subsequent sale of it was a matter in which the plaintiff was interested only to the extent of his right of pre-emption.

Nothing resembling an agreement with the Council, which could be specifically performed, is alleged.

The plaintiff does not in his bill set up any interest in the old road, or any agreement respecting it created by the conversations or negotiations which preceded the passing of the by-law, or existing in any way other than from his asserted right to have the road kept open as his way of access to his land. His claim is to have the whole road across the three lots kept open.

Yet one cannot avoid observing that the demand to have the whole road kept open, not only where it touched the plaintiff's land, but where it crossed the lands of three other persons, is founded on a misapprehension of the provisions of the statute.

Until 1873 the prohibition against closing any public road, whereby any person would be excluded from ingress and egress to and from his lands or place of residence over such road, was absolute, the law declaring that "*all such roads shall remain open for the use of the person who requires the same.*" This did not convert the public road into a private road. It remained a public road, unclosed and unaltered, and within the statutory definition of public highways; although it was allowed to retain that character for the convenience of "the person who required the same," and not because the general public might not have been better served by another road.

In 1873 the words I have put in italics were replaced by the words, "unless the council, in addition to compensation, shall also provide for the use of such person some other convenient road or way of access to his said lands or residence."

The road over which ingress or egress to or from one's land is had, is the road adjoining the land; the road from which the land-owner steps on to his land, not a road which may be rods or miles away, although part of the same concession line or other highway.

In *Falle and The Corporation of Tilsonburgh*, 23 C. P. 167, part of a road was closed by a by-law. A person

whose land and residence were upon that road, but at a distance from the part stopped up, was held not to be entitled to object to the by-law.

In *Moore v. The Corporation of Esquesing*, 21 C. P. 277, the applicant succeeded in maintaining his *locus standi* by satisfying the Court that he came directly from the road to his land, and passed directly from his land to the road. In that case Hagarty, C. J., noticed that persons who merely used the road as a convenience, but had no lands abutting on it from or to which ingress or egress would be affected, seemed to be without the protection of the law.

The utmost right, therefore, which in any view of the facts, and even under the stringency of the former law, this plaintiff could have asserted, would have been the right to have the road kept open where it abutted on his own land. He could not have resisted the diversion of it along the line between lots one and two, in place of its extension across the lots two and three, or across Cawley's land. Whether his right would have been even as extensive this, or whether the fact of his having access to his land and residence by the sixth concession road would not have removed him from the operation of the statute, may be debatable.

In *Moore v. Esquesing*, 21 C. P. 277, the learned Chief Justice indicates some strong reasons for holding that the existence of access by another road ought not to disable the land-owner from insisting on every road being kept open from which he had direct access to any part of his land. Still what the statute professes to secure is ingress and egress to or from the land or residence, not convenient access to the mill or the market town.

It was agreed at the hearing of this cause that the corporation should keep open two rods of the old road at the north west corner of the plaintiff's land, as part of the public road, and that the plaintiff's claim to have the whole road kept open should drop.

It is said that the council passed a resolution re-dedica-

ting these two rods as a road. No such resolution is shewn to us unless it is that of 1875, which excluded the two rods from the order for the sale of the road. The Council would doubtless, if requested, confirm the resolution by a by-law; but as in my opinion the jurisdiction of the Court of Chancery is excluded by the effect of secs. 240, and 241, it would not be proper to make a decree in this suit even in the terms of the agreement. The decree as drawn up could not, even if there were jurisdiction, be sustained without variation, because it awards a perpetual injunction against closing a road, which, under the statute, must be liable, like any other road, to be closed on a proper occasion and after the observance of the prescribed formalities.

There are two reported cases in which the Court of Chancery was appealed to, to restrain action upon Municipal By-laws: viz., *Carroll v. Perth*, 10 Gr. 64, and *Grier v. St. Vincent*, 12 Gr. 330, 13 Gr. 512. In each case the application failed, not by reason of want of jurisdiction, but because the applicant had not, by coming promptly for relief, entitled himself to the exercise of the jurisdiction which the Court possessed. It was clearly pointed out that the jurisdiction of the Court was not to adjudicate upon those matters which the statute assigned to the Courts of law, but to restrain the enforcement of a by-law of doubtful validity, until the applicant had an opportunity to move in the Common Law Court to quash it.

Besides asking to have the road kept open, the plaintiff asks, in the alternative, for another convenient way of access to his land, and for compensation for the injury to his property by the closing of the road.

Under the circumstances in which the case comes before us, it is unnecessary further to discuss the question of access by another road. On the materials with which we have to deal we could not possibly say that the Council should do more than they have done or agreed to do; and it would therefore serve no useful purpose to speculate on the difficulties which a plaintiff must surmount before he

can establish his right to such a decree as the alternative prayer of the bill asks for. On the question of jurisdiction, however, I may say that my present opinion is, that the plaintiff is concluded by the by-law No. 189. Reading the words of sec. 422, "No Council *shall close up* any public road," &c., by the light of the construction already given to similar words in sec. 425, I think we must construe sec. 422 as forbidding not only the actual obstruction of a public road, but the passing of a by-law to close it, unless another mode of access is provided for those whose ingress and egress to and from their lands or residences have been over that road. Whether such access should be provided by the same by-law which closes the road or by another by-law, or in any other manner, the providing of it would seem to be a condition precedent to the right to close the road by passing a by-law which declares it closed. It never was doubted that under the former law a by-law might be moved against and quashed because it stopped a road over which a landowner had access to his land. The interference with access which that law forbade and which was fatal to the by-law, is now permitted upon a certain condition, viz., providing a substituted way, in addition to compensation. If the condition is not complied with, the prohibition stands as it did in the former law, and the by-law should be moved against as before. The by-law would be illegal, and under sec. 240, as under the corresponding sections of the former acts, the by-law may be quashed for illegality. The matter itself, viz., the closing of a road, being clearly within the power of the Council, the restriction being upon the particular exercise of that power, I think the by-law could not be treated as void, but would become valid and binding if not attacked within the year. It would be a very inconvenient construction of the statute which would leave it open to a landowner to stand by while a by-law was passed to close a road which adjoined one side of his farm, and to open another in lieu of it, which might not be accessible to him, and then after expense had been incurred, and the posi-

tion of the Council and of other parties changed, and after years had passed, to come forward with a claim for another road, or to insist on treating the by-law as void and the former road as still existing. Yet one does not readily see how such an assertion of right could be defeated if the section should be construed as creating an absolute right for him to have, and a corresponding obligation upon the Council to furnish him a road.

It might happen that, in ignorance of any such claim, the full statutable assessment of two cents in the dollar had been appropriated to other uses, leaving nothing to meet the unexpected demand. Therefore, without professing to have exhaustively considered the subject, and without desiring to express an opinion which I may not, after argument, change, my impression is, that no obligation is created upon the council by sec. 422, which is capable of being enforced by action, but that the remedy of the person requiring access is by quashing the by-law, and that that remedy is lost by the lapse of the year. I think, in this matter, as in other particulars dealt with by our municipal law, the intention and the policy evidenced by the Legislature, are in accord with the maxim, *Vigilantibus non dormientibus lex servat*.

Grounds are not wanting for applying the same remarks to the question of the jurisdiction to decree compensation when the by-law has once irrevocably closed the road. The idea that the adjustment of compensation should be treated, like the providing of access, as part of the condition precedent to the right to pass the by-law, derives some countenance from the language of section 373, which gives due compensation for the damages beyond any advantage which the claimant may derive from "*the contemplated work*." On this subject, however, as for another reason it is clear that no claim for compensation can be maintained in this suit, I say no more at present than that any doubts I have of the correctness of the reading of sec. 424, which I have suggested as applying to access, are stronger as applying to compensation.

The right to compensation is given by sec. 373, which declares that every council shall make to the owners or occupiers of, or other persons interested in real property, entered upon, taken or used by the corporation in the exercise of any of its powers, or injuriously affected by the exercise of its powers, due compensation for any damages (including cost of fencing when required) necessarily resulting from the exercise of such powers beyond any advantage which the claimant may derive from the contemplated work; and any claim for such compensation, if not mutually agreed upon, shall be determined by arbitration under this Act.

But for this provision a person whose land happened to be injuriously affected by the exercise of the statutory powers of the council, would have to submit to the loss.

The Legislature, recognizing the principle that the community should not benefit at the expense of individual members of it, has provided that due compensation shall be made for the injury; not that the council shall be treated as wrong-doers, and rendered liable to an action, but that such compensation shall be made as shall be determined by arbitrators under the Act. No power to enquire into or assess the amount of such compensation is given to any other tribunal. When the amount is once fixed, a resort to the Courts may be proper for the purpose of enforcing payment if that should be refused; but the amount to be paid must be that determined by arbitrators under the Act.

In this respect the provision resembles the condition of the insurance policy, which in *Scott v. Avery*, 8 Ex. 497, 5 H. L. Cas. 811, was held to make the adjustment of the amount of damages by arbitration a condition precedent to the right to bring an action.

The remedy provided cannot be held to be directory or cumulative. In the *Dundalk R. W. Co. v. Tapster*, the company being authorized to make calls which their statute declared it should be lawful to sue for in any of the Queen's Courts of Record in Dublin, sued for calls in the Queen's Bench at Westminster, but failed. Lord Denman said, at

p. 100, "The right and the remedy are both created by the Legislature, and the company are bound to pursue the remedy provided for it."

I find the rule of law thus clearly and concisely stated in Mr. Sharswood's note to *Vestry of St. Pancras v. Battenbury*, in the American reprint of 2 C. B. N. S. at p. 487, "Where a right with its appropriate remedy existed at Common Law, if a statute gives a new remedy, in affirmative words, or rather without a negative express or implied, this does not take away the Common Law remedy. But if the right be conferred or created by the statute, the remedy prescribed by the statute and no other can be pursued."

I am therefore clearly of opinion that we must allow the appeal.

Moss, C. J. A.—I have but few observations to add to the judgment of my brother Patterson, in the result of which I fully concur.

It appears to me that the plaintiff wholly failed to establish a case for the interference of the Court of Chancery. To arrive at that conclusion I think it is only necessary to examine the prayer of his bill with the view of ascertaining the specific relief to which he conceived himself entitled. The first branch is that it may be declared that the defendants had no right or authority to pass a by-law to close up, sell, or dispose of the old stage road, and that by-law No. 189 is illegal and void.

Now, I take it to be beyond question that the council not only were empowered, but were bound, to close up the road, if in their opinion that course was required by the public interest. It is true that they were not to close the road without providing for the plaintiff's use some other convenient road or way of access to his land or place of residence. But I entertain no doubt that the failure to make such a provision only rendered the by-law subject to be quashed upon application pursuant to the statute. If the plaintiff felt himself aggrieved by its passage, it was

his duty to move against it within a year. To hold otherwise would be, in my judgment, opposed to the plain language of the statute, and likely to produce the highest inconvenience.

The manifest object of the legislation relative to proceedings for quashing a by-law was, to establish a period of limitation within which it should be liable to be impeached on proper grounds, but after which, where it was within the competence of the council to pass it, it should be absolute and incontrovertible.

No special jurisdiction is conferred upon the Court of Chancery to declare such by-laws invalid, but, on the contrary, where the year has elapsed no Court can hear their validity questioned. Unless I am mistaken, the Court never assumed jurisdiction to test the legal validity of a by-law, except on the principle of *quia timet*.

It was only a reasonable extension of the powers of the Court, or a legitimate expansion of its authority to meet new circumstances, when it held that where from the necessity of waiting until term the complainant could not have yet moved a Court of law to quash the obnoxious by-law, and there was danger of irreparable mischief being inflicted in the meantime, it ought not to withhold its aid. But this principle cannot be invoked where three years had elapsed between the passing of the by-law and the filing of the bill.

Indeed the plaintiff has not, as I read his bill, attempted to set up any special ground of equity. He complains that the council have not provided for his use another convenient road; but it is settled by authority that that is clearly an objection cognizable in a Court of law. He also alleges that he had no knowledge or notice of the by-law, and did not appear before the council.

I am far from assenting to the proposition that such an assertion on his part, even if strictly accurate, would give him a title to relief in equity. But upon the evidence it is undisputed that he was perfectly acquainted with the action of the council, and his claim to consideration now appears

to be based upon what is contended to be the effect of the colloquy he had with the members of the council before the by-law was passed. The bill does not even remotely point to such a case, and if it had, I do not think it could have availed the plaintiff.

The second branch of the prayer is, that it may be declared that by the passing of by-law No. 205, that portion of the earlier by-law which authorizes a sale of the road was repealed, and that the prompt repeal of this by-law by by-law No. 209 did not revive that portion of No. 189, which authorized a sale.

To this the obvious answer is, that the plaintiff had no right to object to the sale of the land. When the council resolved to close the road, the statute gave them the authority to sell. We are in fact remitted to the question of their power to pass the by-law.

The same observations apply to the third paragraph of the prayer, which asks for a cancellation of the conveyances of portions of the road to purchasers. If the road was lawfully closed, the plaintiff has no right to complain of the particular disposition made of the land of which it consisted.

The remaining branch of relief which the plaintiff sought is, compensation for the damage which he alleges he has sustained and will sustain by the closing of the road. The by-law recites that the plaintiff waived any right to compensation.

I cannot but think that if with knowledge of its terms the plaintiff did not choose to challenge its validity at law, he is precluded from now seeking to be compensated. But even if his laches in this respect was not a bar, I am satisfied that the only mode of fixing the compensation is by arbitration under the statute.

The question upon this appeal which has given me the most difficulty is, what should be the legitimate consequence of the consent given at the trial on behalf of the corporation to maintain the two rods as part of the public road or highway. This is worked out in the decree by

perpetually restraining the corporation from neglecting to maintain as a public highway that portion of the old road. I am not disposed to impair the effect of a consent given at the trial of a cause, but I am unable to hold that such a consent will support the decree.

It is out of the question to affirm that the corporation had the right to deprive itself of the power to deal otherwise with this portion of the road, if the public interest so required. No such consent could give the Court jurisdiction to decree the maintenance of this as a highway, without regard to any change of circumstances.

I must confess that I should have been disposed to hold the defendants to this consent, if I could have done so consistently with what I conceive to be sound principle, but I think that it cannot save the plaintiff from the allowance of this appeal, with costs, and the dismissal of his bill.

BURTON and MORRISON, JJ. A., concurred.

Appeal allowed.

MECHANICS' BUILDING AND SAVINGS SOCIETY V. GORE
DISTRICT MUTUAL FIRE INSURANCE COMPANY.*Mutual insurance policy—Assignment to mortgagee—Subsequent insurance by mortgagor.*

Held, reversing the judgment of the Queen's Bench, 40 U. C. R. 220, that where a mortgagee takes a transfer of a policy under the latter part of section 39 of 36 Vic., ch. 44, O., by way of additional security, the policy continues to be voidable by the acts of the mortgagor.

Held, also, that making a mortgage is an alienation within the meaning of that section, and a mortgagee may therefore avail himself of the power of novation accorded to alienees in general by taking the steps pointed out in the second paragraph of the above section, in which case he acquires a separate independent interest under the contract, and the policy will not be avoided by the acts of the mortgagor.

THIS was an appeal from the judgment on demurrer of the Court of Queen's Bench, reversing a judgment of Galt, J., reported 40 U. C. R. 220. The pleadings are stated there, and in the judgments on this appeal.

The case was argued on the 15th of January, 1878 (a).

Bethune, Q. C., for the appellant. It is quite clear that if the assignment of the policy had not been executed, the policy would have been voidable; and by the express terms of the consent to the assignment, the defendants stipulated that the assignment was to continue to be voidable, notwithstanding the assignment, for the same causes as if the assignment had not been executed. Billington continued to be insured after the assignment, and the defendants were interested in having the protection of Billington's good conduct just as much as before the assignment. *Burton v. Gore District Mutual Fire Ins. Co.*, as reported in 12 Gr. 156, has no application to this case, because there the consent to the assignment appeared to have been absolute in form. The Judges were not agreed in that case as to the ground of liability, although they seem to have agreed that the defendants were liable. The correctness of this judg-

(a) *Present*.—MOSS, C.J.A., BURTON, PATTERSON, J.J.A., and BLAKE, V.C.

ment is doubted by Draper, C. J., in *Livingstone v. Western Assurance Co.*, 16 Gr. 15. In the report of the case in 14 U. C. R. 342, it appears that there was consent to an absolute assignment to the plaintiffs, and even then the Judges were not agreed as to whether the defendants were liable. In the case of *Tillon v. Kingston Mutual Ins. Co.*, 1 Sel. N. Y. 405, the consent to the assignment was absolute. *Smith v. The Niagara District Mutual Ins. Co.*, 38 U. C. R. 570, correctly expresses the state of the law upon this subject, and Mr. Justice Galt was right in following that decision in this case. The Court of Queen's Bench rely, amongst other authorities, on *Livingstone v. The Western Assurance Co.*, as reported in 14 Gr. 461; but the decree of the Court of Chancery in that case was reversed by the Court of Error and Appeal. (See 16 Gr. 9 to 16.) Reference is also made to marine insurance cases, but it is to be remarked that marine contracts of insurance are in a different form from contracts of the kind now in question. Mr. Justice Wilson was of opinion that the words "as though such assignment had not been executed," were used so as to give the right to cancel the contract under section 26 of 36 Vic. ch. 44, O., but it is submitted that this right would exist under the section just mentioned without any such condition contained in the consent to the assignment. It is averred in the declaration that by force of the statute the plaintiffs occupied the position of the original insured; and the plaintiffs also contend that these words were intended to keep alive a right to avoid in consequence of some cause of avoidance which had occurred before the assignment. It is submitted, however, that even if a cause of avoidance, in consequence of Billington's acts, existing before the assignment, could be taken advantage of by the defendants after the assignment, the words will equally well apply to the acts of Billington after the assignment, because there is to be the same right of avoiding the policy as though the assignment had not been made. Then it is urged that these words were used for the purpose of shewing that the contract was to be construed just as the original contract was,

with the exception of the substitution of the plaintiffs for Billington; but this would be accomplished by the former part of the condition as well as by force of the statute, and so the words in question were quite unnecessary for that purpose. Both the plaintiffs and Billington were insured, but the risk was all one, the only effect being that in the event of loss \$2,000 would be payable to the plaintiffs (if the mortgage was unpaid), while \$1,000 would be payable to Billington. The statute has been changed since the decision in *Burton v. Gore District Mutual Fire Ins. Co.* 12 Gr. 156. Under sec. 39 of 36 Vic. ch. 44, O., it is quite clear that the Legislature intended the policy to continue in force for both mortgagors and mortgagees. The third replication is bad, inasmuch as it admits the existence of the conditions contained in the consent to the assignment of the policy and set out in the plea, but alleges that the subsequent insurances effected by Billington were of a different interest from that insured by the plaintiffs, and also that these subsequent insurances were effected without the plaintiffs' consent. This is a different case from that stated in the declaration. The declaration states the original contract and an assignment thereof to the plaintiffs as collateral security, admitting that Billington was also insured. If Billington remained insured, the subject insured being the same, the double insurance would then subsist by the act of the assured, and would avoid the policy. If the construction of the conditions of the consent to the assignment set out in the plea, (and not denied by the replication), for which the defendants contend, be true, then the facts set out in the replication are entirely immaterial; because if the policy by the terms of this consent remained liable to be avoided by the acts of Billington, the fact that the plaintiffs did not know or consent to these acts would make no difference.

D. McCarthy, Q. C., and *B. B. Osler*, Q. C., for the respondents. The second plea is bad, because it admits that the plaintiffs became the assignees of the policy, and were, after the assignment, insured thereby. It does not appear

by the said plea to be a condition of the defendants' consent to the assignment that any double insurance by Billington should avoid the policy, and that such double insurance should be the act or by the knowledge of the insured. Moreover, no double insurance or other act of the plaintiffs avoiding the policy is set forth in the plea. By the wording of the plea, it would appear, and it is thereby admitted, that as to the condition and terms of the policy, the plaintiffs were, with the consent of the defendants, substituted for Billington. Otherwise the policy would not be avoided by any act of the plaintiffs, but only by the act of Billington. The true meaning of the words, "continue to be avoidable as though such assignment had not been executed," is, that the company, in giving the consent to the transfer, did not intend to waive their right to avoid their policy for any cause then existing, and which, if a loss had happened immediately prior to the transfer, could have been set up as against Billington—for example, a misrepresentation as to the state of title in the application, or as to the situation of adjacent buildings. It is immaterial that the assignment was by way of collateral security. Such an assignment is an absolute transfer of the right of action and the benefit of all moneys to be derived therefrom. So long as the debt exists for securing which the assignment was executed, and even after payment of the debt, Billington could not avail himself of this policy until it had been been re-assigned to him with the consent of the defendants: *Fitzgerald v The Gore District Mutual Fire Ins. Co.*, 30 U. C. R. 97. The fact that Billington had an equity to redeem the policy, gave him no control over it until redemption and re-assignment. He could not by any instrument release the policy or discharge the defendants from payment of the moneys secured thereby, and it is submitted that Billington, being unable to release by any contract with the defendants, could not, by an act of which both the plaintiffs and defendants were ignorant and unable to control, avoid the plaintiffs' security, and so discharge the defendants from the contract they had entered into with

the plaintiffs. If he could, then the contract would be to insure the plaintiffs to the extent of their debt, but subject always to avoidance by the act of Billington, of which act neither party to the contract need have notice, which clearly could not have been the intention of the parties, and such an interpretation ought not to be given to the contract: *Ford v. Beech*, 11 Q. B. 852, 866. The question of the amount recoverable by the plaintiffs is not raised by the pleadings under consideration. As to the plaintiffs' third replication to the second plea, it is well settled that a mortgagor and a mortgagee have separate insurable interests: *Angel on Insurance*, 101-2; *Richards v. The London and Lancashire Fire and Life Ins. Co.*, 25 U. C. R. 400. By the policy and its assignment, and by the terms of the consent set forth in the second plea, following the provision of the Statute 36 Vic. ch. 44, sec. 39, O., the policy made void by the execution of the mortgage was revived by the execution of the assignment and consent, and became a policy for the security of the mortgagee; and being a mortgagee policy, any insurance of the mortgagor's interest was not an insurance in the same interest. The first part of the section voids the policy absolutely on alienation. Then there is a provision for the absolute purchaser reviving it on giving security; and the section lastly provides for reviving the policy, by consent, to secure the mortgagee. The mortgagor is not protected by this section. As to him, the alienation by way of mortgage has made the policy void; the saving clause protects the mortgagee only. All that affects the mortgagor in this clause is the continuation of his liability on the note; formerly this was an important element in deciding who was the insured, but since the changes in the law allowing mutual companies to do business for cash, and doing away with the lien on the land to secure the premium, it is submitted that the liability on the note is no evidence of interest in the policy. They referred to *Burton v. The Gore District Mutual Fire Ins. Co.*, 14 U. C. R. 342, 12 Gr. 156; *Livingstone v. The Western Ins. Co.*, 14 Gr. 461,

16 Gr. 9; *Tillou v. The Kingston Mutual Fire Ins. Co.*, 1 Sel. N. Y. 405; *Gale v. Lewis*, 9 Q. B. 730; *Carpenter v. Washington Ins. Co.*, 16 Pet. 495; *Flanders on Insurance*, 455; *Phillips on Insurance*, 5th ed., secs. 866, 868.

June 25, 1878 (a). BURTON, J. A.—The case of *Burton v. The Gore District Mutual Ins. Co.*, 12 Gr. 156, was much relied on in the argument, and as the decision in that case was affirmed by the late Court of Error and Appeal, it is binding upon us, if not distinguishable in its facts. And the points really presented for our consideration are, whether this case is affected by the recent changes in the Mutual Fire Insurance Companies' Act, 36 Vic. ch. 44, O., and the special condition annexed by the company to the assignment.

The Act 35 Vic. ch. 12, O., relating to the assignment of choses in action, has, in my opinion, no application to a case of this kind.

The Court of Chancery, in the case referred to, held that a contract of this nature, though indivisible at law, was divisible in equity, and the transfer to the mortgagees, having been with the knowledge of the company effected for their security and expressly assented to by the company, became for all practical purposes the same as if the mortgagees had in the first instance applied for and obtained a policy in their favour as such mortgagees.

Bearing this in mind, I have never appreciated the inconveniences which some learned Judges have suggested as likely to flow from that decision. If the policy had been taken out as an insurance of the mortgagees' interest, it could not be affected by any act of the mortgagor, and the company would not necessarily become entitled to an assignment of the security, if in point of fact the insurance was effected at the expense of the mortgagor.

It was not a mere assignment of a chose in action, as to which the doctrine laid down in *Rolt v. White*, 9 Jur. N. S. 343, referred to by Mr. Justice Gwynne in his judgment

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in *Smith v. Niagara District Mutual Ins. Co.*, 38 U. C. R. 570, is perfectly well established, and I can well understand that a creditor simply (having no estate or interest in the premises assured), who had taken a transfer of a policy, with the consent of the company, would stand in no better position than the assignor: that he would acquire no new or independent status, but, as the transferee of a legal right, would be simply in the same position and subject to the same conditions as his assignor; and that the policy therefore would be liable to be defeated by any violation of the conditions on the part of the original assured. Such transfer is in fact only an equitable assignment of the fund payable to the assured in the event of loss.

But in a case like *Burton v. Gore District Mutual Fire Ins. Co.*, 12 Gr. 156, where the policy was transferred to mortgagees whose insurable interest was unquestionable, with the knowledge on the part of the company of the object with which it was done, and with their full concurrence, it was but reasonable that the Court should look to the substance rather than the form of the transaction, and hold that what had there occurred should be regarded as a new and independent equitable contract of insurance in favour of the mortgagees.

That case did not depend upon the statute at all, and I quite agree with those Judges who held that a mortgagee was not an alienee within the meaning of that Act; but a great change has been made by the 36 Vic. ch. 44, sec. 39, O., which recognizes mortgagees as alienees, and renders a policy upon any alienation made even by way of mortgage voidable. Mortgagees, it is true, are not expressly named in the earlier part of the section, which declares "that in case any property is alienated by sale, insolvency, or otherwise, the policy shall be void," but that they are intended to be included is manifest from the proviso, which declares that where the assignee, meaning alienee, is a mortgagee, the directors may permit the policy to remain in force, and to be transferred to him by way of additional security, without requiring any premium note from the assignee.

The language of this section is not very clearly expressed, but is probably intended to mean this: That in case of an absolute transfer, the policy, though ceasing to have any validity, may be transferred to the alienee, and upon his application, within thirty days may be revived on certain terms, and on being so revived becomes a new policy in his favour on the same terms in every respect as if he had been the original assured.

But in case of a mortgage, although without the assent of the company it would become void, yet with their permission it may remain in force, and with the like permission be transferred by way of additional security to the mortgagee.

That is to say, the original policy remains in force, and that contract, with all its incidents and conditions, is assigned to the mortgagee, who is entitled to all the rights and remedies which his assignee would, but for the assignment, have been entitled to upon it.

If this be the correct view of the new Act, it is unnecessary to consider the condition which appears to have been annexed to the assignment, viz., that the plaintiffs should be bound by all the conditions of the policy, and that the said policy should continue to be voidable as though the said assignment had not been executed.

Had the question turned upon the wording of this condition alone, I should have been disposed to hold that it was not sufficient to support the contention of the defendants—that, to use the words of Lord St. Leonards, in *Anderson v. Fitzgerald*, 4 H. L. C. 510, to have the effect of abridging the rights of the plaintiffs under the policy and assignment, it should have been framed with such deliberate care that all who run might read. But if I construe the section aright, the condition carries the matter no further than the act itself, and is merely in affirmance of it.

That the plaintiffs imagined when they accepted this assignment that they were accepting a security which the mortgagor, the moment that they were placed in an antagonistic position with him, could render valueless, is in-

credible. Almost the entire value of their security was in the buildings insured, and it is ridiculous to suppose that they voluntarily and knowingly accepted such an illusory security as this is.

The recent change in the law has made an insurance in a Mutual Insurance Company little better than a delusion and a snare. It is well established in insurance law that a grant by way of mortgage works no change in the insurable interest of the grantor, yet under the Act, as now amended, the owner of property finds his policy avoided because he has raised a small loan on the security of the insured premises, a matter which in no way affects the risk or liability of the insurer. A mortgagee, entrapped into accepting what he might not unreasonably regard as an insurance of his interest as mortgagee, finds his policy avoided by an act over which he has no control. Such would appear to be the law, and the more generally it is known the better, in order that the insuring portion of the public may be induced to avoid such companies; until their responsibilities upon their contracts are placed by legislation upon a more equitable footing.

Since writing the above, I have had an opportunity of seeing the judgment of my brother Patterson, who points out that a mortgagee, being now recognized as an alienee within the meaning of the statute, is entitled to the privileges granted to absolute alienees on complying with the conditions required by the Act, as to giving security for the premium, and that under the proviso the additional privilege is secured to him of taking an assignment of the original contract as collateral security. That construction had not suggested itself to me, but it seems free from any objection; and when the word void is read as voidable, as under the Statute of 1864 it was enacted it should be read, it removes many of the apparent inconsistencies in the language of the section, and some of the difficulties and objections to which I have referred may be obviated. If the companies will act in a fair spirit and point out to mortgagees that they can, by becoming liable or giving

security for the premium, have the policy ratified and confirmed to them as a new policy for their own benefit, not liable to be defeated even by the arson of the mortgagor, the apparent injustice done to parties situated as these plaintiffs are may be avoided. It is of course quite possible that companies may decline to effect insurances in that way, but as a matter of fair dealing, mortgagees, accepting an assignment of a policy as these plaintiffs have done, should be apprized of the valueless nature of their security, if their mortgagor fraudulently or innocently does anything to avoid it, in order that they may secure a positive security in another company by assuring their own interest, which they could generally do at a much less cost than is usually paid for an insurance effected by the owner.

I have come to the conclusion, with very great regret, that this appeal must be allowed, and the judgment of the Queen's Bench reversed.

PATTERSON, J. A.—The plaintiffs declare upon a policy issued by the defendants to one Billington for \$3,000, viz., \$1,000 on his manufactory, \$1,000 on his tools and machinery, and \$1,000 on his stock, which policy Billington transferred to the plaintiffs as collateral security to a mortgage for \$2,000 upon the property on which the manufactory was situate, and the manufactory and the tools and the machinery. I am not sure, owing to a passage in the Appeal Book which is so printed as to be unintelligible, that the tools and machinery are alleged to be included in the mortgage, but I think that is intended. It is clear that the stock was not covered by the mortgage. It is alleged that the defendants ratified and confirmed the policy to and in favour of the plaintiffs, and that the manufactory, tools, machinery, and stock were destroyed by fire, whereby the plaintiffs sustained immediate loss and damage to the several amounts so insured thereon respectively, and to the aggregate amount of \$3,000. It is not shewn how the burning of the stock was a loss to

the plaintiffs. The claim is for the whole amount of the policy.

The plea which is before us on this demurrer, alleges that the transfer was accepted by the plaintiffs, and the said consent to the same was given by the defendants, subject to the condition that the plaintiffs should be bound by all the terms and conditions of the policy, as Billington was bound by the same, and that the policy should continue to be voidable as though the assignment had not been executed; and that the policy was not ratified or confirmed to the plaintiffs otherwise than by the said consent to the assignment thereof as collateral security. And then it sets out a condition avoiding the policy in case of double insurance without the consent of the directors of the defendant company, and alleges a violation of that condition by Billington after the transfer.

There are two replications before us. The first of them sets up only matters of law, and is in effect a demurrer, as was pointed out by Mr. Justice Wilson in the Court below. The other denies that the second insurance by Billington was of the same interest as that which was insured by the plaintiffs, by and under the policy in the declaration mentioned.

Without trying to eliminate the exact meaning of this language, we may understand the replication as alleging that Billington, by his second insurance, did not insure the interest of the plaintiffs as mortgagees of the building, tools and machinery. What it means as applied to the stock, in which the plaintiffs had no insurable interest, I do not pretend to understand. If required as an answer to the plea, the replication does not avoid the charge of effecting a second insurance on the stock, and therefore does not answer the plea at all; which I take to be the effect of the decision of the Supreme Court in *Samo v. Gore District Ins. Co. (a)*, though I have not yet had an opportunity of seeing the judgments delivered in that case.

(a) Not yet reported.

The whole matter therefore turns on the validity of the plea.

I do not understand sec. 39 of the Act respecting Mutual Insurance Companies, (36 Vic. ch. 44 O.,) as having the exact effect attributed to it by Wilson, J., in the Court below, or by Gwynne, J., in *Smith v. Niagara District Ins. Co.*, 38 U. C. R. 570. As I read it, it provides for three cases—or rather for the case of the assignment or alienation of insured property in three separate aspects—First. In case of alienation, where the assignee does not take a transfer of the policy, the policy becomes void and shall be surrendered to be cancelled, and the assured shall thereupon be entitled to receive his deposit note or notes upon payment of his proportion of losses and expenses accrued prior to the surrender.

Secondly. In case of alienation of the property, the assignee may have the policy transferred to him, and upon application to the directors, and on giving proper security to their satisfaction for such portion of the deposit or premium note as remains unpaid, and with their consent, within thirty days after the alienation, may have the policy ratified and confirmed to him, and by such ratification and confirmation shall be entitled to all the rights and privileges, and be subject to all the liabilities and conditions to which the original party insured was entitled and subject.

I agree that in this case an entire novation of the contract takes place, and that the conditions, liabilities, rights, and privileges attach exactly in the same manner as if a new policy had been effected by the assignee. But I see nothing to authorize the assignment of a policy which covers more property than that acquired by the alienee. *Primâ facie* the policy is void; and that has been settled to mean the whole instrument, although it may insure several independent subjects, only one of which has been assigned—unless I misapprehend the decision of the Supreme Court. The right given to take a transfer of the policy cannot be construed to enable the assignee of one

piece of property to insure another in which he has no interest. Therefore, the provision can only apply to policies which are confined to the assigned property.

The third case is where the assignee is a mortgagee. In that case the directors may permit the policy to remain in force, and to be transferred to the mortgagee by way of additional security, without requiring any premium note or undertaking from such assignee, or his becoming in any manner personally liable for premiums or otherwise; but in such cases the premium note or undertaking, and the liability of the mortgagor in respect thereof, shall continue in nowise affected. In other words, a person who takes a mortgage on the insured property may, if the directors consent, have the existing insurance as collateral security.

There is in this third case no novation of the contract, as there is in the second case. It is the old contract with the mortgagor which continues. He is the person who remains liable to pay losses and expenses, and although the policy is transferred as security, I apprehend that on payment of the mortgage money no formal re-transfer would be necessary. The effect of the proviso I take to be to preserve from forfeiture upon alienation by mortgage a policy which, with the consent of the directors, is transferred to the mortgagee as additional security, but not to alter or affect the conditions of the policy, except by making it voidable by acts of the mortgagee as well as by acts of the mortgagor.

This, however, is a privilege accorded to the mortgagor and mortgagee in addition to the rights given to alienees in general under the second head. It will be noticed that this third case is a proviso attached to the second. "Provided, however, that in cases where the assignee is a mortgagee, the directors may permit, &c." The statute thus interprets itself, and shows that making a mortgage is an alienation within the meaning of the section. The mortgagee may avail himself of the power of novation accorded to alienees in general under what I have classed as the second head, by taking the steps there pointed out, and

may thus free himself from danger from the acts of the original insured; or he may simply take a transfer of the policy as collateral security, leaving the original contract with its attendant conditions unchanged, save so far as he becomes entitled to whatever money may happen to become payable under it as part of his security, very much as he would be if the policy contained the words often found in policies effected on mortgaged premises, "Loss, if any, payable to the mortgagee."

Now, turning to the declaration, we find that Billington "transferred, assigned and set over unto the plaintiffs, with the permission, knowledge and consent of the defendants, all his right, title and interest in the said policy and all benefits and advantages to be derived therefrom, as collateral security to the mortgage for \$2,000 and interest hereinafter referred to, and the defendants ratified and confirmed the said policy to and in favour of the plaintiffs."

These last words "ratified and confirmed," are taken from the second or novation branch of the section, and might be taken to indicate that proceedings had been taken under that branch; but the allegation that the transfer was as collateral security, and the absence of any averment that the plaintiffs had done those things which an assignee of the property is required to do to entitle him to a novation of the contract, make it clear that the transaction is under the third branch, and that the condition of the consent set out in the plea only interprets and expresses the effect of the statute itself.

For this reason the defendants are, in my opinion, entitled to judgment on the demurrer to the plea.

I think it would be otherwise in the case of a transfer ratified and confirmed to an assignee who was not a mortgagee, or to a mortgagee who came within the same class, by performance of the same pre-requisites; because, as the statute creates a new contract, and in substance effects a new policy, the condition which assumes to vary or restrict its operation would not, in my judgment, be just or reasonable, and would, by force of sec. 34, be null and void.

But I am further of opinion that the plaintiffs, if they had placed their claim under the second branch of sec. 39, must have failed by reason of the policy covering subjects of insurance in which they had no insurable interest. I should have had difficulty in construing the section in any other way, even if the matter had been *res integra*; but, as I have before remarked, the decision in Samo's case concludes the question, if it holds, as I understand it to do, that the policy is one and indivisible.

On the other hand, on my construction of the proviso, the directors may, in case of a mortgage, permit the policy to remain in force—that is, to remain in force as regards every thing which it covers; and as the insurance contract continues to be a contract between the company and the mortgagor, the transfer may operate to secure to the mortgagee the payment of whatever money may become payable in respect of the premises mortgaged to him, without interfering with the mortgagor's interests.

How a transfer should be made in such a case, and whether the right of action at law would be in the mortgagor or mortgagee, would be details of procedure easily adjusted without depriving either party of the benefits intended by the statute.

These considerations may be a sort of set-off against the hardship urged as attending a transfer which leaves the transferee exposed to danger from the acts or defaults of his transferor. The so called hardships on the one hand, and the greater facilities on the other, both result from the preservation of the original contract instead of the institution of a new one.

I agree that the appeal must be allowed.

BLAKE, V. C.—I concur in the conclusion arrived at in the judgment of my brother Patterson, which I have read. By the first paragraph of sec. 39, in case the insured property be alienated, the policy is avoided; by the second paragraph, the assignee may have the policy assigned to him “on giving proper security,” &c., “and by such ratifi-

cation and confirmation, said assignee shall be entitled to all the rights and privileges, and be subject to all the liabilities and conditions to which the original party insured was entitled and subject." Thus the rights and liabilities of membership attach to such assignee. By the proviso to this section, the directors may permit the policy to remain in force, and to be transferred without requiring a premium note or undertaking from the assignee, and without the assignee "becoming in any manner personally liable for premiums or otherwise." The mortgagee may become assignee, and occupy the position of "the insured," with his rights and liabilities on "giving proper security" as required by the Act; or he may decline to give such security, note, or undertaking, or to come under any liability to the company; in which case he does not assume the position of "the insured," but takes the assignment for what it may be worth, the company dealing with and recognizing the mortgagor as the insured, whose liability to the company shall "continue in nowise affected." The plaintiffs in the present case chose to accept this latter position, and are not, I think, under these circumstances entitled to judgment in their favour on the plea.

Moss, C. J. A., concurred.

Appeal allowed.

Fol. 20 A.R. 412.

Fol. 13 A.R. 430.

BOICE V. O'LOANE.

Com. and Fol. 11 P. R. 337.

Action on judgment—Limitation—38 Vic. ch. 16, sec. 11, O.

Held, reversing the judgment of GWYNNE, J., 28 C. P. 506, that sec. 11 of 38 Vic. ch. 16, O., does not apply to judgments; and an action may still be brought thereon within twenty years, under C. S. U. C. ch. 78, sec. 7.

THIS was an appeal by the plaintiffs from the judgment of Gwynne, J., on a demurrer to the fourth plea, reported 28 C. P. 506, where the pleadings are set out.

The appeal was argued on the 14th of March, 1878 (*a*).

C. Robinson, Q. C., for the appellants.

J. Bethune, Q. C., for the respondent.

The arguments and cases cited sufficiently appear in the judgment.

June 25, 1878 (*a*). Moss, C.J.A., delivered the judgment of the Court.

This case raises a question closely resembling that which recently engaged our attention in *Allan v. McTavish*, 2 App. R. 278, where we decided that "the Real Property Limitation Amendment Act, 1874," 38 Vic. ch. 16, O., does not limit to ten years the period within which an action at law may be brought to recover the money secured by a mortgage of real estate, containing a covenant for payment by the mortgagor. Following the rule which we took to be established by *Hunter v. Nockolds*, 1 Mac. & G. 640, and numerous other cases, we held that ch. 88, Consol. Stats. U. C., applied to remedies against the land, and ch. 78, sec. 7, Consol. Stats. U. C., to remedies against the person. The effect of the judgment of this Court was, that as the intention of the Act of 1874 was only to amend ch. 88, by abridging the time within which remedies against the land must be pursued, it left unaffected the periods of limitation of proceedings to which ch. 78 was applicable.

(*a*) *Present*.—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

In the present case the appeal is from a decision of Mr. Justice Gwynne allowing a demurrer to an action at law, brought upon a judgment recovered less than twenty years, but more than ten years, before the issue of the writ. The plaintiff relies upon section 7 of ch. 78, which according to our previous judgment still gives the right to sue upon a covenant within twenty years after the cause of action arose. That section deals with actions of covenant or debt upon any bonds or other specialty, and it is conceded that a judgment is a specialty in the sense that it is an obligation of record, but it is argued that the effect of the whole legislation is to prove that it is not a specialty provided for by that Act.

While I confess that I have been much impressed with the reasoning of the learned Judge, which would be very cogent if the matter were *res integra*, my difficulty is, to perceive any solid ground upon which his decision can be rested consistently with that of *Hunter v. Nockolds*, 1 Mac. & G. 640, to which his attention does not appear to have been directed. If this is a debt upon a specialty, as seems to be conceded, it falls within the provisions of ch. 78, which is unaffected by the Act of 1874.

I proceed to examine the arguments upon which the contrary opinion is founded.

The 43rd section of ch. 1, 4 Wm. IV, limited the time for bringing any action, suit, or other proceeding to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, to twenty years. It is pointed out that at the time of the passing of this Act a judgment did not create any lien or charge either at law or in equity upon lands in this Province, but only rendered them liable to be seized and sold upon a writ of *feri facias* being issued. Hence it is suggested that the Legislature, in adopting without alteration this provision of the Imperial Statute, expressed their opinion that this mode whereby a judgment might be said to affect lands afforded a sufficient warrant for the Act speaking of money secured by a judgment as a

charge upon or payable out of land. I cannot help thinking that it is at least as probable a conjecture that it was introduced *per incuriam*, and simply because it was in the Imperial Act, which was being copied *verbatim et literatim*. It is possible, however, that the principle that a judgment did not affect lands as such was not generally known or recognized when this Act was passed. It is at least worthy of note that the question was considered in the Court of King's Bench two years subsequently, and although the point seems to have been previously decided by the Court, the judgment had not been reported. Macaulay, J., while thinking that the previous decision should not be overruled, unless by a Court of Appeal, was of opinion that a judgment of the Court did bind lands for the purpose of sale under 5 Geo. II. ch. 7, or of an *elegit*, to the same extent as a judgment of the Court of King's Bench in England, binds lands for the purpose of extent under Westminster, 2, ch. 18. I only refer to this case for the purpose of shewing that if I correctly apprehend its purport, the effect of a judgment upon lands was not deemed a point beyond controversy. As, however, in fact there was no difference between one judgment and another as to the manner in which either could be said to affect lands, the argument is, that the prescription was enacted in relation to all judgments equally without any exception. If that be so, it is argued that the case of judgments being fully provided for, the statute of 4 Wm. IV. continued in force with precisely the same effect upon the rights of judgment creditors after the enactment of the statute of 7 Wm. IV. (Consol. Stat. U. C. ch. 78,) as it had before. It is observable that the period of limitation under each Act being the same, it was then of no practical importance under which statute the case of a judgment was deemed to fall.

In support of the contention that the earlier Statute (ch. 88, sec. 24,) applied to all judgments, the learned counsel for the defendant placed great reliance upon the case of *Watson v. Birch*, 15 Sim. 523, in which Vice-Chancellor Shadwell considered the effect of the same section in the

Imperial Act. The question was, whether the section applied to a case in which payment of a judgment debt was sought, not out of the real estate, but out of the personal estate, of the debtor. The learned Judge said that there is nothing in the word "judgment," as used in the section, of which the language is general, to confine its meaning to a judgment which, owing to the nature of the assets of the party indebted, might affect land, but could not operate on personal estate; and the intention of the Legislature was, that no proceeding whatever should be taken on a judgment after the lapse of the prescribed period. That certainly is a strong opinion upon the proper interpretation of the section. But there are several considerations which seem to lessen its weight and value. In the first place, the decision was prior to *Hunter v. Nockolds*, 1 Mac. & G. 640, and so far as it may conflict with that case must yield in authority. Again, it contains no reference to the provisions of ch. 27, sec. 3, which Lord Cottenham subsequently decided to be—at least in the case of covenants—that which prescribed the limitation of remedies against the person. Furthermore, at the time the Imperial Act was passed the effect of a judgment in England upon the lands of the debtor was very different from its operation in this Province. By the construction placed upon the Statute of Westminster 2, relating to the writ of *elegit*, judgment debts became incumbrances upon every estate in fee simple which the debtor had at the time the judgment was recovered.

The rights of a purchaser might be overreached by the operation of a writ issued after the purchase, but upon a judgment recovered before. Hence judgments were treated as existing incumbrances which it was necessary to remove before the completion of any purchase, and to enable intending purchasers to search for them, the practice of docketing had been established, and provided for by statute. As Lord Chancellor Sugden explained, in *Rolleston v. Morton*, 1 Dr. & War. 171, the judgment creditor had, by virtue of the Statute of Westminster, a general lien, which upon the issue of an *elegit* became a specific lien.

We have been referred to some other decisions and dicta of learned Judges, which it will be convenient to consider at this point. It will be observed that they are all prior to the judgment in *Hunter v. Nockolds*.

When expressing my opinion in *Allan v. McTavish*, 2 App. R. 278, I had occasion to refer to *Henry v. Smith*, 2 Dr. & War. 381, which has again been pressed upon our attention, and upon referring to the report of our decision I do not deem it necessary to add anything to the observations I then made.

In *O'Hara v. Creagh*, 3 Ir. Eq. 187, Brady, C. B., read the 3 & 4 Wm. IV. ch. 27, sec. 40, as barring a demand which might have been recovered against the real estate, whether it was sought to be put in force against the real or personal estate. He draws attention to the anomaly of holding that a demand is enforceable against the personal property of the debtor, where the proceeding is barred as against his real estate.

Similar views were expressed by the Court of Exchequer in Ireland, in *O'Kelly v. Bodkin*, 2 Ir. Eq. 407.

Great stress was laid upon the anomaly that would exist if a creditor could have an execution for one amount against the personal property or the person of the debtor in any case which falls within the 42nd section of the Act, and an execution for another and different amount against his real estate. The case of *O'Kelly v. Bodkin*, 2 Ir. Eq. 372, was much canvassed by the learned Barons in delivering their opinions. It was thought to be a strong argument against the construction adopted by the Master of the Rolls, that according to it one sum might be recovered by suing upon the personal covenant contained in the mortgage deed, and another and different sum by proceeding directly against the land.

Yet this distinction between the remedies of the mortgagee against his mortgagor personally, and against the mortgaged land, has been recognized law since the decision of *Hunter v. Nockolds*, 1 Mac. & G. 640. The precise point decided was, that where a judgment had been obtained

upon a bond securing payment of a principal sum with interest, the statute barred the recovery of more than six years' arrears of interest in a suit instituted to enforce payment out of land or rent. As I have indicated, expressions are to be found in the opinions of the different members of the Court supporting the view that the statute also sets up a similar bar to the recovery of interest for a longer period in a proceeding against the personalty.

These were the considerations with which Sir Edward Sugden was impressed in *Henry v. Smith*, but the force of which was removed by the judgment of Lord Cottenham. *Greenway v. Bomfield*, 9 Hare 201, does no more than follow *Hunter v. Nockolds*. It simply decides that where an incumbrancer is entitled to be paid interest out of rents, the interest must be computed from six years antecedent to the claim being carried in before the master. In other words, as I read the judgment, an incumbrancer can only recover six years arrears of interest as against the lands.

I do not think that any of these cases lend real aid to the defendant's contention.

The point of most consequence made on his behalf, as it appears to me, is that by 24 Vic. ch. 41. sec 10, it was enacted that no judgment of any Court in Upper Canada should create or operate as a lien or charge upon lands, and that the Legislature, with the knowledge of this state of the law, used in the Statute of 1874 precisely the same language as that used in ch. 88, Consol, Stats., viz., "Any sum of money secured by any mortgage judgment, or lien, or otherwise charged upon any land;" and that as they knew that a judgment did not create any charge, they cannot have intended the words "charged upon any land," to be coupled with "judgment." The suggestion, therefore, is, that the section shall be read thus: "No action shall be brought to recover any sum of money secured by any mortgage, or any sum of money secured by any judgment, or any sum of money secured by any lien or otherwise charged upon or payable out of any land." I cannot assent to that construction of the statute. It is in conflict with the

decision in *Allan v. McTavish*, because if the effect of that construction is, to limit the period of recovery in an action at law upon a judgment to ten years, it should have the same effect upon a mortgage. I think it is impossible to hold that the section extends to every kind of mortgage, for example a mortgage of a ship, or an ordinary chattel mortgage. If then it is confined to a mortgage charged upon land, and to a lien charged upon land, I cannot perceive any rule upon which the judgment spoken of should not in the ordinary course of interpretation be deemed to be one charged upon land. Any one simply reading the language of the section itself, without reference to the circumstance that neither at the time the Act 4 Wm. IV., was passed, nor at the time of the enactment of the Act of 1874, was a judgment a charge upon land, would, I think, be of opinion that the ordinary natural signification of the language imported that the judgment referred to was one charged upon land.

The authorities referred to on behalf of the defendant support this mode of interpreting the statute. For example, the language of Foster, B., in *O'Kelly v. Bodkin*, 2 Ir. Eq. 372, cited by Mr. Justice Gwynne:—"The expression *otherwise charged*, necessarily implies that in view of the Act a mortgage is one mode of charge upon land, and a judgment another." In *Henry v. Smith*, 2 Dr. & War. 388, Sir Edward Sugden, said: "Unless judgments were considered to have been a charge upon land, the introduction of the word "otherwise," would have been improper. It would appear, therefore, that this, which is true in fact, was within the intention of the Legislature, that a sum of money secured by a judgment should be considered a sum of money charged upon or payable out of land."

Having regard to the ordinary meaning of the language, and to the opinions I have quoted, the conclusion would seem to be, that if there were no judgments operating as charges upon lands, the section did not affect judgments at all—in other words, that there was no subject matter to which that part of the section was applicable—and that no period of limitation was prescribed for judgments not form-

ing a charge upon land. If that would be the proper construction of the Statute of 4 Wm. IV., I do not see why the same interpretation should not be given to the Statute of 1874.

I do not think that the passage from Lord St. Leonards' Treatise on the Real Property Statutes, contains anything at variance with this view, when properly considered. After referring to the opinion of Shadwell, V. C., in *Watson v. Birch*, he says: "This, perhaps, is not a just exposition of the statute, for the provision relates to any sum of money secured by judgment, &c., or otherwise payable out of any land or rent; but as one remedy, viz., that against the land, is barred by the statute, the remedy against the personal estate is held to be barred also." He then gives verbatim the last two sentences of the passage from *Henry v. Smith*, cited in the report of *Allan v. McTavish*. This is far from supporting the view for which the defendant contends. On the contrary, it shews that in the opinion of the learned author the term "judgments" as used in the statute, does not necessarily include all judgments, as Shadwell, V. C., seems to have thought, but is confined to judgments payable out of any land or rent. The authority of *Hunter v. Nockolds*, is an answer to the rest of his reasoning.

Upon these grounds we are of opinion that the appeal must be allowed, with costs, and judgment entered for the plaintiff on the demurrer.

Appeal allowed.

Exp. 8 O.R. 98.

CAMERON ET UX. V. WAIT.

13 A.R. 225.

*Highway—Right to original allowance—50 Geo. III. ch. 1, 4 Geo. IV. ch. 10
—Municipal Acts—Construction of.*

The plaintiff claimed in right of his wife, under a deed to her, dated 7th October, 1867, of the south half of lot 9 in the 5th concession of Haldimand, to be entitled to the original allowance for road between lots 8 and 9, by reason of the Justices of the Quarter Sessions having in 1837 laid out a road across this south half in lieu, as was claimed, of the original allowance. In proof thereof the report of the then surveyor was produced, dated 15th July, 1837, addressed to the justices, reciting the petition of twelve freeholders for the new road, with his certificate of his having examined and surveyed it and given notice according to law; the road to be 50 feet wide. He also certified as to his having examined the original allowance and found it impracticable by reason of bad hills and swamps, while the new road was good. On the back of the report was endorsed the minute of the Quarter Sessions thereupon, namely, "Read and opposed, and confirmed this 18th July, 1837," which, with the user, &c., of the road as a highway, was the only evidence of their action in the matter. In March, 1866, a by-law was passed opening up this allowance, and the owner of lot 9 then moved his fence to the limit of the allowance. In November, 1875, a by-law was passed repealing the previous by-law, but without expressing it to be for the purpose of closing up this road allowance. At the time the road was laid out the Quarter Sessions had no power to sell an original road allowance or convey it to the person whose land was taken in compensation; and they could only alter a road on condition that the new or substituted road should be of not less width than the one for which it was substituted, while in ordering a new road they had a discretion to lay it out of any width between 40 and 60 feet. The original road allowance in question was 60 feet, while the new road was 40 feet.

Held, affirming the judgment of the Common Pleas, 27 C. P. 475, that the plaintiff acquired no right to the original allowance under 50 Geo. III. ch. 1, and 4 Geo. IV. ch. 10, under which the land was laid out; nor under 20 Vic. ch. 69, or the subsequent Municipal Acts identical therewith.

Per BURTON, J. A., that even if sec. 426 of 36 Vic. ch. 48, O., was retrospective, it only applied to new roads which had been opened in substitution for or in lieu of the original road allowance, and not to the case of a wholly new road, which the evidence proved this to be.

Per HARRISON, C. J. O., assuming, without deciding, that sec. 426 is retrospective, and that the plaintiffs were entitled thereunder to the original allowance, they could not succeed in this action for want of a conveyance thereof from the corporation.

Per HARRISON, C. J. O.—The words "may convey," in the above section, is compulsory; and the corporation cannot refuse a conveyance to a person entitled to it.

THIS was an appeal from a judgment of the Court of Common Pleas, making absolute a rule *nisi* to set aside the verdict for the plaintiff and enter a verdict for the defen-

dant, reported 27 C. P. 475. The facts are fully stated there, and in the judgments on this appeal.

The appeal was argued on the 5th September, 1877 (a).

S. Richards, Q. C., for the appellants. The evidence shews that the new road laid out in 1837, and ever since in use, was a new or travelled public road laid out and opened in lieu of the original allowance for road between the south half of lot No. 8, and the south half of lot No. 9, or in lieu of that part of the original allowance lying south of the part of the new road crossing these lots—within the meaning of the Municipal Acts. It also clearly appears that no compensation for such new road was paid to the owner of the land appropriated for it. The several Municipal Acts, 22 Vic. ch. 99, sec. 318; C. S. U. C. ch. 54, sec. 332; 29 & 30 Vic. ch. 51, sec. 334, and 36 Vic. ch. 48, sec. 426, O., are all retroactive, and extend to and include cases where a new or travelled public road had, before the passing of the said Acts, been laid out and opened in lieu of an original allowance for road. These Acts and sections apply as well to cases where such public road was laid out and opened under legal authority and power, as to other cases. The right to the original allowance for road, given by these Acts and sections, vests in the owner of the land appropriated for the road whose land adjoins the allowance, and such right follows the ownership and can be claimed by the owner for the time being of the land. If the municipality have not conveyed the allowance to a previous owner, such right would pass to the grantee of the land. The above Acts and sections, or some of them, gave to the plaintiff the right to the said road allowance, or to that part of it which lies south of the part of the new road crossing the lots 8 and 9, without any conveyance from the municipality: *Re Burritt and the Corporation of Marlborough*, 29 U. C. R. 119; *Webster and The Corporation of West Flamborough*,

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35 U. C. R. 593; and such right was sufficient to entitle the plaintiffs to possession of the road allowance as against the defendant. The trespasses complained of were committed on parts of the road allowance both north and south of the part of the new road crossing the lots, and in excess of what was necessary for its use; and upon the evidence, the plaintiffs are entitled to retain the verdict in respect of all or some of the trespasses.

Bethune, Q. C., (with him, *J. W. Kerr*.) for the respondent. The new road opened in 1837 between lots 8 and 9 was not, nor is there any evidence that it was, laid out and opened in lieu of the original allowance, but it was a new and additional road: 50 Geo. III. ch. 41, sec. 3, and other sections; 4 Geo. IV. ch. 10, secs. 3 and 7. The new road is only fifty feet wide, and the allowance is sixty-six feet wide: 33 Geo. III. ch. 4; 36 Vic. ch. 48, secs. 404, 405, 407, 424, 426, 427, 428, 441, sub-sec. 2, O.; *Rex v. Sanderson*, 3 O. S. 103; *Purdy v. Farley*, 10 U. C. R. 545; *Winter v. Keown*, 22 U. C. R. 341; *Regina v. Hunt*, 16 C. P. 145; *Regina v. Great Western R. Co.*, 32 U. C. R. 506; *Regina v. Plunkett*, 21 U. C. R. 536; *Re Lawrence and Thurlow*, 33 U. C. R. 223. The several Municipal Acts, 22 Vic. ch. 99, sec. 318; C. S. U. C. ch. 54, sec. 332; 29 & 30 Vic. ch. 51, sec. 334, and 26 Vic. ch. 18, sec. 426, are not retroactive, and do not extend to or include cases where a new or travelled public road had been laid out and opened before the Acts were passed, and the said Acts do not apply to cases where such public road was not laid out under legal authority. The new road at the time it was opened was considered to be as much on lot 10 as on lot 9, and therefore the owner of lot 9 would not be entitled to the allowance; and the evidence shews that when a correct survey was made by surveyor Brown, the true line between 10 and 9 was east of the new road, and that no part of the new road is on 9, but wholly on 10, and the plaintiffs, therefore, as holders of 9, would not be entitled to the allowance. Inasmuch, therefore, as the plaintiffs were not holders of lot 9 at the time the new road was opened, the

then holder of lot 9 would only be entitled to the allowance, and such holder has not conveyed his right, if any, to the allowance, to plaintiffs; and the allowance would not pass without such conveyance. Section 426 of the Municipal Act confers no right to the allowance upon the plaintiffs. It only gives the municipal council the power of closing up and conveying the allowance under certain circumstances which do not exist here—such as the report of its road surveyor, &c.—which was not obtained in this case. And it is optional with the council whether they exercise their power and close up, sell, or convey the allowance or not, and the council would not be justified in closing up or conveying the allowance if required for public use, as is the fact in this case, or if required for the use of the defendant for ingress and egress to and from his own land, as in this case. The council have the power to refuse to close up or convey the allowance, and they have refused. The plaintiffs cannot close up an original allowance as against the public, or as against the council, whose rights and powers are paramount to those of a private individual. The defendant requires the use of this allowance for the purpose of ingress and egress to and from his own land, and therefore the council have no power to close up, sell, or convey it to the plaintiffs; and if the council have not the power to close it or convey it to the plaintiffs, the plaintiffs cannot claim it, for the plaintiffs' rights cannot be paramount to those of the council: C. S. U. C. ch. 54, sec. 218; *Moore v. Corporation of Esquesing*, 21 C. P. 277; *Falle and The Corporation of Tilsonburg*, 23 C. P. 167. The council having passed a by-law about eleven years ago for the purpose of opening this allowance, and through their pathmaster having actually opened it, and the plaintiffs having acquiesced in this opening, by having moved their fence and allowed the public to use the allowance as a highway for so many years, and it never having been in their possession, the plaintiffs are now estopped from claiming it as their own. Moreover, the highway has never been legally closed, the proper notices not having been given

of intention to close it. The plaintiffs had not such actual or exclusive possession of the allowance as to enable them to maintain trespass *quare clausum fregit*: *Street v. Crooks et al.*, 6 C. P. 127. There is no evidence to sustain either the first count, or that part of the third count which charges a trespass to the fences, rails, and posts mentioned in the first count.

June 25, 1878. (a) BURTON, J. A.—The substantial question argued before us, apart from any technicality arising upon the pleadings, was as to the right of the plaintiffs to maintain an action of trespass for the removal by the defendants of a fence placed by them across what was an original allowance for road between lot 8 and 9 in the fifth concession of the Township of Haldimand, which has never been conveyed to the plaintiffs under the authority assumed to be conferred by the Municipal Act, but of which they claim to be entitled to the possession without any conveyance.

The 426th section of the present municipal law, 36 Vic. ch. 48, O., which is identical with section 318 of the 22 Vic., and section 334 of the 29 & 30 Vic. enacts, that in case a new or travelled public road has been laid out and opened *in lieu of an original allowance for road*, and for which no compensation has been paid to the owner of the land appropriated in place of such original allowance, the owner, if his lands adjoin the original allowance, shall be entitled thereto, in lieu of the road so laid out, and the council of the municipality, upon the report in writing of its surveyor that such new or travelled road is sufficient for the purposes of a public highway, may convey the original road allowance to the person through whose land the new road runs; and when any such original allowance is in the opinion of the council useless to the public, and lies between lands owned by different parties, the council may, subject to the conditions aforesaid, sell and convey a part thereof to each of such parties as may seem just and reasonable. And it

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then provides that if compensation was not paid, and the owner of the land through which the new road passes does not own the land adjoining the original allowance, the amount received from the purchaser shall be paid to the person who *at the time of the sale* owns the land through which the new road passes.

At the time this road was laid out the Quarter Sessions had no power to sell an original allowance or to convey it to the person whose land was taken in compensation, but if the proprietor was unwilling to part with his land without compensation, a machinery was provided for assessing the amount of such compensation, which the petitioners were bound to pay before the road could be taken.

There is no reason for quarrelling with the conclusion of the learned Judge who tried the case that no compensation was in fact paid in this case; but I think it equally clear that none was sought for or demanded, and it is out of the question to say that he then expected to receive the road allowance as an equivalent, as only a few years previously an Act had been passed prohibiting the sale of such allowances.

But it was urged that when the policy of the law was again changed, and the councils empowered to sell the original road allowances or to grant them in compensation for a substituted road, there had arisen a large accumulation of such cases, and it was the intention of the Legislature to deal with them as well as with cases to arise in future.

That may possibly be so, but at all events the statute must be confined to cases in which the new road had been opened in substitution for, or in lieu of the original road allowance, and not to the cases of a wholly new road. As the law stood when this road was petitioned for, the magistrates in Quarter Sessions could only exercise the power of altering a road on the condition that the new or substituted road should not be of less width than the one for which it was substituted. In ordering a new road they were not so restricted, but had a discretion to lay it out of any width between forty and sixty feet.

In delivering judgment in *Purdy v. Farley*, 10 U.C.R. 568, Mr. Justice Burns says: "I take it to be a clear principle of law that every intendment is to be made in favour of the public, and against the individual who seeks to deprive the public of the right which it is confessed the public once had, * * and that it is incumbent upon the individual who asserts a private right acquired over a public one which has once vested that he shall do so upon clear irrefragable evidence, and that nothing shall be left to depend upon conjectural inference and assumption. * * It by no means follows that because it was more convenient to the public generally to have a road varied or altered, it must be necessarily assumed the old road became unnecessary, and that the fact of a new road, laid out through a man's farm *ipso facto* entitled him to the option of saying that he would take the old road in lieu of the new one taken off his property. I think there was something more required than the mere fact of taking from his property a new road, even if we should feel satisfied in our own minds that it was thought at the time of the act being done the public allowance would never be used, or could not be made into a road."

What evidence then is there that the new road was in lieu or substitution of the original allowance? It is not stated in the petition nor in the surveyor's report to be in substitution of the original side line, but is intended apparently as a new line, for the purpose of giving the owners of a number of lots in both concessions the advantage of the Percy road. It is not laid out as the law required of the width of the allowance, and no application was made for a conveyance by the council until recently, although if the plaintiffs' claim be well founded the owner of lot 9 in the year 1858 would have then been entitled to call for such conveyance.

In 1857 the defendant obtained a patent from the Crown for lot No. 8, in the 5th concession, and at that time he was entitled to have the benefit of the allowance for road between it and the plaintiffs' lot.

It seems a harsh thing to hold that the Legislature intended that he should be deprived of this right without any compensation, and this, too, for the benefit of a party who acquired his title to the adjoining lot from a person who at the time the new road was laid out over it had no right to claim the original road as compensation, and any statute which can thus defeat a right by relation ought, I think, to receive a very strict construction.

Is it very unreasonable to assume that the first part of the section, which refers to roads which have been laid out and opened, should be restricted to transactions *in fieri* at the time of the passing of the Act, but which had not been perfected by the report in writing of the surveyor, which was made a condition precedent to the execution of the conveyance?

It is scarcely to be supposed that such a report could be required in the case of a road which for nearly half a century had been adopted by the public as a highway, or that the owner's right, if otherwise valid, could be affected by the inability of the surveyor to furnish such a report arising possibly from the defective state of the highway, by reason of the default of the municipal officer; but in the case of a new road, whether laid out recently before or after the passing of the Act, the importance of such a report is apparent, and it may well be, therefore, that the Legislature, whilst providing for roads to be laid out in the future, might properly make a similar provision for those which, though ordered to be laid out, had not been fully completed at the time the Act came into operation.

If I am right in the view which I take of this case that it is not brought within the statute, inasmuch as there is no evidence to show that the road was laid out *in substitution of the original road allowance*, it is not necessary to hazard any opinion upon the meaning of these words.

For the same reason it is unnecessary to offer any opinion upon the question so ably discussed by Mr. Justice Gwynne, as to the right of the owner to claim the original allowance in any case where it is not bounded on each

side by his lands. A careful perusal of the various Acts which have from time to time been passed on the subject shews that the language employed goes strongly to support that view, when read in connection with that portion of the same section which provides that when the original allowance lies between lands owned by different parties and is *useless to the public*, the council may, on the conditions referred to in it, convey a portion to each.

I think the conclusion arrived at by the learned Judges of the Common Pleas is the correct one, and that this appeal should be dismissed with costs.

HARRISON, C. J. O.—The *locus in quo*, which is an allowance for road laid out in the original survey of the Township of Haldimand, was at one time beyond dispute a common and public highway.

Unless, therefore, it has lost that character and become the private property of the plaintiffs, or one of them, their action must fail.

A highway once established must so continue until altered or put an end to by some competent authority.

Mere non-user of a highway is clearly not enough to destroy its character as a highway: *Badgeley v. Bender*, 3 O. S. 221; *Nash v. Glover*, 21 Gr. 219.

The old common law procedure for altering or stopping up a highway, and which is the origin of all subsequent legislation on the subject, was by the writ *ad quod damnum*: *Rex v. Ward*, Cro. Car. 266.

This was an original writ issuing out of and returnable in the Court of Chancery, directed to a sheriff, to enquire by a jury whether the changing a highway would be detrimental to the public or not, the inquisition upon which being a proceeding only *ex parte* was traversable, and anciently the aggrieved party might have been heard against it before the Chancellor: *Angell on Highways*, sec. 325.

The change designed by means of this procedure was only effective when there was a proper equivalent to the

public for the alteration or stopping up of the old road: *Ex parte Armitage*, Amb. 294; *Ex parte Vennor*, 3 Atk. 766.

The modern mode of accomplishing the same end both in England and here is the creature of statute, and the statutory mode has been found simple and inexpensive, so that the old common law mode has long since been disused.

Strict compliance with the provisions of the statute authorizing the closing up or diversion of a public highway is necessary to the successful interference with the rights of the public to the use of every part of an old highway.

The principal English statutes are 13 Geo. III., ch. 78, sec. 19; 55 Geo. III., ch. 68, and 5 and 6 Wm. IV., ch. 50, sec. 85.

A reference to the following cases will show how strictly the English Courts have required compliance with the statutory provisions in order to the effective diversion or closing of a highway: *De Ponthieu v. Pennyfeather*, 5 Taunt. 634; *Rex v. Justices of Worcestershire*, 8 B. & C. 254; *Rex v. Justices of Kent*, 10 B. & C. 477; *Rex v. Marquis of Downshire*, 4 A. & E. 698; *Rex v. Justices of Cambridgeshire*, 4 A. & E. 111; *Rex v. Milverton*, 5 A. & E. 841.

The principal colonial statutes affecting this Province were 50 Geo. III., ch. 1; 4 Geo IV., ch. 10; 20 Vic. ch. 69, sec. 10; 22 Vic. ch. 99, sec. 518; Consol Stat. U. C. ch. 542; 36 Vic. ch. 48, sec. 425, 426, O.

The last of these was the statute in force when this action was brought and decided in the Court of Common Pleas.

A reference to the following cases will shew how strictly the Provincial Statutes have been construed by our Provincial Courts: *Purdy v. Farley et al.*, 10 U. C. R. 545; *In re Choate et al. and the Township of Hope*, 16 U. C. R. 424; *In re Burritt and the Corporation of Marlborough*, 29 U. C. R. 119; *Regina v. Great Western R. W. Co.*, 32 U. C. R. 506; *In re Lawrence and the Corporation of*

Thurlow, 33 U. C. R. 223; *In re Webster and the Corporation of West Flamborough*, 35 U. C. R. 593.

The statutes in force in 1837, when the substituted road was said to have had its origin, and the old road to have been altered, were 50 Geo. III. ch. 1, and 4 Geo. IV, ch. 10.

The Legislature by sec. 2 of 50 Geo. III. ch. 1, passed in 1810, authorized Justices of the Peace in General Quarter Sessions, assembled in the several districts of the Province, "to appoint, as occasion may require, one or more surveyor or surveyors of highways," &c., within their respective districts, "to lay out and regulate highways and roads," &c. And by sec. 3, declared "that upon application in writing being made to any such surveyor by twelve freeholders, * * stating that any public highway or road in the neighbourhood of the said freeholders now in use is inconvenient, and may be altered so as better to accommodate His Majesty's subjects and others travelling thereon, or that it is necessary to open a new highway or road, it shall and may be lawful for such surveyor * * to examine the same and report thereon in writing to the Justices at their next ensuing Quarterly Sessions, describing particularly the alteration intended to be made, or new highway or road to be opened, giving at the same time public notice thereof. And if no opposition, as hereinafter mentioned, shall be made to such report, it shall and may be lawful for the said Justices, and they are hereby required to confirm the said report, and to direct such alteration to be made, or such new highway or road to be opened accordingly," &c.

In the event of opposition, the section provided for the empannelling of a jury who, after hearing evidence upon oath against the said intended alteration or new highway, should, upon their oath, "either confirm or annul the said report, or so alter and modify the same as the exigency of the case may appear to require." Their verdict was made final. It was then made the duty of the Justices "to direct such highway or road to be altered or opened accordingly." The report so confirmed or altered was to remain of record.

The ninth section of the same Act provided "That in all cases where it shall be found necessary to alter the direction of any such highway or road already laid out, so that the land through which it formerly passed shall become unnecessary for a public highway," &c., the surveyor was "authorized and required to sell such land, and to grant the same under his hand and seal, * * to any purchaser, which sale and grant as aforesaid shall convey a legal title to such purchaser." This was followed by a proviso, "that if the owner or owners of the land through which such new road may pass, shall be willing to accept the old road as a compensation, such owner or owners shall and may take the same, by a conveyance under the hand and seal of the surveyor," &c.

The tenth section provided that in the event of a sale "the money arising therefrom shall be given to the owner or owners of the land through which the new road may pass as an indemnification for the same." And if such owner or owners were dissatisfied with the amount, provision was made for the empanelling of a jury who, upon their oaths, were to determine "whether any and what further sum should be allowed to such owner or owners;" and their verdict was made final.

The Act of 1824, 4 Geo. IV., ch. 10, sec. 6, enacted: "That in all cases when application shall be made to any surveyor, &c., to have any new road laid out, or any road already laid out altered," those making the application should be deemed liable to pay any further sum, after proceeds of sale, ascertained by the jury, except where it manifestly appeared to the Justices that "the said alteration is of manifest utility to the public at large, and not of a local nature."

Up to this time the statutes provided only for the alteration of old roads or the making of new roads, and the disposal of old roadways.

The pre-requisites were :—

1. The written application of twelve freeholders.
2. The examination by the surveyor.

3. The report of the surveyor.
4. The publication of the report.
5. The confirmation of the report by the Justices.

Of these not the least important was the report by the surveyor.

1. It was to be made to the Justices at their next Sessions:

2. It was to describe particularly the alteration intended to be made, or new highway or road intended to be opened.

Incidentally power was given where, through the alteration of the direction of an existing highway, the land over which it formerly passed becomes unnecessary, to convey the same as compensation to the owner or owners of the land through which the new road may pass, or to sell the same, and pay the purchase money to such owner or owners, with or without additional compensation according to circumstances.

In the early history of the Province, when the population was scant, and the municipal system imperfect, it was found more convenient in travel to deviate from the line of an original line of road, than to expend the money necessary for the removal of natural obstacles to the use of the way, such as hills, swamps, or rivers, and provision was thus made under certain conditions for the legalization of these deviations, and not only so, but incidentally for the sale and conveyance of the site of the original line of road.

As early, however, as 1824, it was discovered that much inconvenience had arisen by reason of the sale of portions of the original Government allowances for road, and therefore the Legislature, by sec. 7 of 4 Geo. IV., cap. 10, repealed sec. 9 of 50 Geo. 3, cap. 1, "so far as regards the aforesaid Government appropriations for such highways and roads." But nothing therein contained was "to restrain any surveyor of highways from selling and conveying any road which he is now by law authorized to sell and convey."

There were, in 1837, hills and swamps upon the line of the old road which to some extent interfered with its use. The new road enabled travellers to avoid these difficulties. The

old road, notwithstanding the hills and swamps, was capable of use even as it was, but the expenditure of a little money would have made it all that could be reasonably desired. It is still in the same condition. Samuel Gleason, the then locatee of lot 9, the fee being in the Crown, made no claim to compensation, so no compensation was paid. This could not have been because the old road was given to him in lieu of the portion of his lot required for the new road, for at that time it was not in the power of any authority known to the law to convey the old road to him.

There was nothing, however, to prevent him giving the land for the new road without compensation. Land then was comparatively of little value in that neighbourhood.

So far the road in question cannot, in my opinion, be held to have lost its character as a common and public highway.

The Act, 50 Geo. III., ch. 1, except as to sections 12 and 35 was, in 1849, repealed by 12 Vic. ch. 80, Sch. B. No. 2.

The Act 4 Geo. IV., ch. 10, was in 1850 repealed by the 13 & 14 Vic. ch. 60.

The 187th section of 12 Vic. ch. 81, as amended by 13 & 14 Vic. ch. 64, Sch. A. No. 33, provided that it should not be competent to the municipality of any township or the municipality of any county to pass any by-law for stopping up any original allowance for road in any township or county, &c., with some exceptions not affecting the present enquiry.

The 188th section of 12 Vic. ch. 81, provided that on the alteration of a road not being an original allowance for road, &c., the site of the old road "shall and may be" sold and conveyed by the municipal corporation under whose authority the alteration was made to the party or parties next adjoining to whose land or lands the same shall have run, and in the event of refusal to any other person or persons whomsoever.

The latter clause (188) was in 1853 repealed and re-enacted with amendments by the 16 Vic. ch. 181, sec. 32.

It is clear that up to this time (1853) the policy of the

law was to preserve to the original allowance for roads in townships their character of highways, and that the road in question still continued to be a common and public highway, although not yet in use by the public. The Crown, on the 12th of October, 1857, granted lot No. 8, in 5th concession of Haldimand, adjoining and abutting on the road allowance, to the defendant.

In the same year there was a change of policy on the part of the Legislature, evidenced by the passing of the 20 Vic. cap. 69. It is entitled "An Act for the disposal of road allowances in the rural municipalities of Upper Canada." It recited that "it had become necessary to provide more fully for the stopping up and sale of original road allowances in Upper Canada." It repealed so much of sec. 187 of 12 Vic. cap. 81, and of sec. 32 of 16 Vic. cap. 181, as prevents township councils and county councils from passing by-laws for stopping up original allowances for roads, or from selling and conveying the same. (sec. 1). It authorized the municipality of each of the townships of Upper Canada, subject to confirmation by the county council "to make by-laws for the stopping up and sale of any original allowance for road, or any part thereof, within such township," and "to determine and declare the terms upon which such original allowance for road shall be sold and conveyed." Similar powers as regards county allowances for roads were conferred on county councils. (sec. 3.)

The power was to stop up any original allowance for road, and in the event of such a power being exercised, there was the incidental power to sell the original allowance so stopped up.

The exercise of these powers was expressly made subject to some restrictions, among which were the following:—

1. In all cases where a public road *has been*, or where a new road *shall be* opened, in lieu of the original allowance for road, and for which compensation *shall have been* or *shall be* paid, the municipal council, &c., shall have power to sell such original allowance for road to the party or

parties next adjoining to whose lands the same shall have run, and in case of his or her refusal to become the purchaser or purchasers thereof, &c., then to any other person or persons whomsoever, &c. (sec. 4.)

2. In all cases where a public road *has been* opened, or where a new road *shall* be opened in lieu of the original road allowance, and for which no compensation *has been* or *shall* be paid the municipal council, &c., shall have power, and they are hereby authorized and *required*, upon the report in writing of the township or county surveyor, &c., that such new road allowance or travelled road is sufficient for the purpose of a public road or highway, to convey such original road allowance to the party or parties through whose lands the same *shall have* run or *shall* run in lieu of such new road. (Sec. 5.)

3. When any such road is in the opinion of such municipality useless to the public, and lies between lands owned by different parties, such municipality shall, subject to the conditions aforesaid, sell and convey a part thereof to each of such parties, &c. (Sec. 6.)

It is manifest on reading this Act that it is retrospective in its operation, but the whole is, I think, subject to the discretionary power of the proper municipal council to pass a by-law closing or stopping up the original road allowance. Until such a power is exercised the road allowance continues a highway, and there is no land to sell or convey to any person. When this power is exercised the character of the highway is gone, and certain persons described are to have the preference as to the land of the old highway.

The 20 Vic. ch. 69, was repealed in 1858 by 22 Vic. ch. 99, but re-enacted with some alterations in language and amendments.

Section 317, sub-section 6, enabled the council of every township, county, city, town, and incorporated village, to pass by-laws for opening, making, preserving, improving, repairing, widening, *altering, diverting, stopping up* * * roads, streets, squares, alleys, lanes, bridges, or other public

communications within the jurisdiction of the council, &c. And sub-section 11 authorized the passing of by-laws for selling the original road allowance to parties next adjoining when a public road was opened in lieu of the original road allowance and for the site or line of which compensation has been paid, and for selling in like manner to the owners of any adjoining land any road legally stopped up or altered by the council; and in case such parties respectively refuse to become the purchasers at such price as the council thinks reasonable, then for the sale thereof to any other person for the same or a greater price.

Section 318 of the same Act enacted that "in case any one in possession of a concession road, or side line, has laid out and opened a road or street in place thereof without receiving compensation therefor, or in case a new or travelled public road has been laid out and opened in lieu of an original allowance for road, and for which no compensation has been paid to the owner of the land appropriated as a public road in place of such original allowance, the owner, if his lands adjoin the concession road, side line, or original allowance, *shall be entitled thereto* in lieu of the road so laid out."

The section further enacted that "the council of the municipality, upon the report in writing of its surveyor, * * that such new or travelled road is sufficient for the purposes of a public highway, *may* convey the said original allowance for road in fee simple to the person or persons upon whose land the new road runs, and when any such original allowance for road is in the opinion of the council useless to the public, and lies between lands owned by different parties, the municipal council *may*, subject to the conditions aforesaid, sell and convey a part thereof to each of such parties," &c.

If I were obliged to read these enactments as new laws, that is without reference to previous legislation, I could not, on the authorities, hold that they contain words so clear and unambiguous as are, in my opinion, necessary to give a retrospective operation to them, or either of them: *Moon*

v. Durden, 2 Ex. 22; *Pinhorn v. Souster*, 8 Ex. 138; *Waugh v. Middleton*, *Ib.* 352; *Pettamberdass et al. v. Thackoorseydass*, 7 Moore P. C. 239; *Marsh v. Higgins*, 9 C. B. 551; S. C. 1 L. M. & P. 253; *Vansittart v. Taylor*, 4 E. & B. 910; *Dickenson v. Kitchen*, 8 E. & B. 789; *Young v. Hughes*, 4 H. & N. 76; *Williams v. Smith*, 2 H. & N. 443; but if I am at liberty to look upon them as being clauses of an Act which is a consolidation of all previously existing laws as to municipal institutions, including the 20 Vic. cap. 69, I might feel justified in giving to them some retroactive operation.

They were repealed in 1859, and re-enacted in sec. 331, sub-secs. 1 and 6, and sec. 332 of Consol. Stat. U. C. cap. 54. The latter were repealed in 1866, and re-enacted in 29 & 30 Vic. cap. 51, sec. 333, sub-secs. 1 and 6, and sec. 334, which are the same as sec. 425, sub-secs. 1 and 8, and sec. 426 of 36 Vic. cap. 48.

I am not satisfied that under the operation of any of these Acts the road in question lost its original character of a common and public highway. There was no by-law of the municipal council closing it up. On the contrary, the municipal council, on 31st March, 1866, passed a by-law to open it, and it was opened. Samuel Gleason, the then owner of lot 9, and at the time the new road was opened, was one of the petitioners to have it opened. On 31st May, 1873, a surveyor assumed to make a certificate with a view to the closing of the road, but the council did not pass any by-law for that purpose. On 26th July, 1873, the council, by resolution, refused to convey the old road to the plaintiffs. On 30th October, 1875, there was a similar refusal. All the council did was on 27th November, 1875, to repeal the by-law opening the road. This certainly could not, under the statute, have the effect of closing it, or vesting it in the plaintiffs, or either of them.

Unless, therefore, there is something contained in 36 Vic. ch. 48, O., the statute in force when this action was brought, which has the effect not only of closing the old road but of vesting it in these plaintiffs, or one of them, the action fails.

I am inclined to the opinion that the closing must still precede sale or transfer of the land over which the highway was established, but conceding for a moment that this is not so, I am of opinion the plaintiff shews no right to recover under section 426 of the Act.

That section provides for a conveyance in order to the transfer of the fee simple of the land to the person entitled. If we were to read the section as vesting the land without a conveyance, we would not only be giving to it an effect widely different from the procedure necessary to the closing of a road by the whole course of legislation on the subject, but be rendering the portion of the section which provides for a conveyance as unmeaning, unnecessary, and utterly useless. Our duty is, if possible, to give effect to every portion of the section. This can be done by reading the section as making a conveyance essential to the passing of title. Until a conveyance properly executed after the happening of all proper preliminaries, I am of opinion that the soil and freehold of the road remains in the Crown, or municipality, as the case may be, (36 Vic. ch. 48, sec. 405.) I do not mean to affirm that it is discretionary with the council to refuse the conveyance on the demand of the person entitled. The words, "may convey," as used in the section, are in my opinion equivalent to the words used in previous Acts, "it shall be lawful and they shall be required." The word "may" is sometimes used in this compulsory sense, and in this sense I think, looking at the context, it was used by the Legislature in the section under consideration.

Where a statute confers authority to do an act, whether judicial or ministerial, in a certain case, it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested and having the right to make the application. See *Maxwell* on Interpretation of Statutes, 218-222.

In such a case, although the words may only be used as conferring the power, the exercise of the power depends not on the discretion of the person or persons authorized,

but upon proof of the particular case out of which the power arises: *McDougall v. Paterson*, 11 C. B. 755.

In giving one person the authority to do the act, the statute impliedly gives to the others the right of requiring that the act *shall* be done, the power being for the benefit not of him who is invested with it, but of those for whom it is to be exercised: *The Supervisors v. The United States*, 4 Wallace, 446.

The Act necessary to entitle the plaintiffs to claim the old road as their own, supposing them or either of them to be the persons or person entitled, is a conveyance of the fee simple thereof by the corporation of the township in which the road is situate, which conveyance the corporation declines to execute.

If an application were made to the Court to compel the corporation to exercise that power, the enquiry would necessarily arise whether all the preliminaries existed, and whether or not the closing of the road allowance by by-law is not one of these; but as there is no such application before us, it is not absolutely necessary to decide the latter point in this case.

Assuming without deciding that section 426 is retrospective in its operation, and may be read independently of and without reference to section 425, and that the plaintiffs are persons entitled under that Act, I am of opinion the plaintiffs fail for the want of the conveyance which, in my opinion, is essential to the successful maintenance of the action by them.

The appeal must, in my opinion, be dismissed, with costs.

MOSS, C. J. A., and BLAKE, V. C., concurred.

Appeal dismissed.

THE ATTORNEY-GENERAL V. WALKER.

Inland Revenue Act, 31 V. c. 8, D.—Excise Duties—Jurisdiction of Court of Chancery.

Sec. 155 of 31 Vic. c. 8, D., enacts that all duties of excise payable under the Act, "shall be recoverable * * as a debt due to Her Majesty, in any Court of competent civil jurisdiction"; and sec. 32 of the A. J. Act, 1873, provides that "no objection shall be allowed on demurrer or upon the hearing of any cause in the Court of Chancery, upon the ground that the subject-matter of the suit * * is exclusively or properly cognizable in a Court of law."

Held, affirming the decree of the Court of Chancery, 25 Gr. 233, without determining whether the A. J. Act extends to Crown cases generally, that under the above sections the Attorney-General is entitled to sue in the Court of Chancery for the recovery of excise duties, even if it be a purely legal debt.

Held, also, that secs. 43 and 44 of the 31 Vic. c. 8, D., do not restrict the right of the Crown to sue in respect of frauds committed upon the revenue to the period of one year, or prevent a recovery in a Court of law, unless a special investigation has been held in pursuance of the Act.

THIS was an appeal from a judgment of the Court of Chancery overruling a demurrer to an information filed by the Attorney-General for the Dominion, reported 25 Gr. 233, where the pleadings are stated.

The appeal was argued on the 14th June, 1878. (a)

S. Richards, Q. C., and *E. Fitzgerald*, Q. C., for the appellant. The information discloses a purely legal demand, and is in effect a common law information in debt for excise duties, and shews no grounds for equitable relief. The Crown has not a right to proceed in equity for a purely legal demand: *Daniell's Practice*, 5th ed. 4; *Attorney-General v. Corporation of London*, 8 Beav. 270; *Corporation of London v. Attorney-General*, 1 H. L. Cas. 440; *Attorney-General to Prince of Wales v. St. Aubyn*, Wightwick 197; *Attorney-General v. Mayor of Plymouth*, Wightwick 134. Even if the Crown could in England proceed in a Court of Equity for a legal demand, there is no authority for doing so here. The jurisdiction of the Court of Chancery in this Province is specially conferred by

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statute, (Consol. Stat. U. C. ch. 12), and in the present case can be claimed only under sec. 26, sub-sec. 10, which gives jurisdiction in cases in which there exists no adequate remedy at law; but in this case an adequate remedy does exist at law. The Petition of Right Act, 35 Vic. ch. 13, secs. 18, 19, O., does not authorize the present proceeding, as that Act extends only to cases in which the Crown is prosecuting as representing this Province. Nor does the A. J. Act, 1873, (36 Vic. ch. 8, O.), sec. 32 extend to Crown cases. Moreover the claim in the present case, being a revenue matter, is in England under the jurisdiction of the Court of Exchequer, which jurisdiction is given by statute (34 Vic. ch. 2, sec. 1, Con. Stat. U. C. ch. 10, sec. 3), to the Courts of Queen's Bench and Common Pleas, and not to the Court of Chancery: *Miller v. Attorney-General*, 9 Gr. 558; *Norwich v. Attorney-General*, 9 Gr. 563; *Regina v. Pringle*, 32 U. C. R. 308. Under 33 Hen. VIII., ch. 39, sec. 55, such a case as the present, being for a crown debt, must be prosecuted in the Court of Exchequer, or, in this country, in the Queen's Bench or Common Pleas: *Miller v. Attorney-General*, 9 Gr. 560. It is admitted by the information that the defendants have paid all duties due according to the returns made of the quantities of spirits manufactured, but it does not shew that the defendants are chargeable with duties on any greater quantities. The 43rd and 44th sections of the Inland Revenue Act, 31 Vic. ch. 8, D., require that the duty shall be charged and computed on quantities to be ascertained in one of the five modes prescribed by those sections, yet it is not shewn by the information that by any one of these modes there were any greater quantities than embraced in the returns. Under sub-sec. 6, of sec. 44 of the Act, the correctness of the returns, if intended to be questioned, is to be inquired into and determined within the year mentioned in that section and in the manner provided by that section, which year in the present case had expired long before the filing of this information, and the correctness of such returns cannot now be questioned. The Statute of Limitations

applies here by analogy to the law between subject and subject. In any event the year mentioned in sub-section 6 is a Statute of Limitation, which the defendant pleads. The various modes of proceedings as remedies pointed out in 31 Vic. ch. 8 D., are all the remedies intended to be allowed, and the Crown is and should be debarred from taking any other proceedings. The remedy referred to in section 155 of the above Act contemplates a debt to be ascertained by the arbitration or other mode referred to in the Act, and is not to be extended beyond the statutory meaning contained therein. Inasmuch as the A. J. Act does not apply to the Crown the information does not shew such a case as would, under the practice and procedure of the Court of Chancery, entitle a subject to maintain such a suit against a subject, and hence the information is demurrable.

J. Bethune, Q.C., (*N. W. Hoyles* with him), for the respondent. Apart from any statutory provision, the information shews a case in respect of which, as between subject and subject, resort might be had to a Court of Equity. (1) As a matter of account, *Falls v. Powell*, 20 Gr. 465; *Attorney-General v. Edmunds*, L. R. 6 Eq. 392. (2) On the ground of fraud, R. S. O., ch. 40, sec. 34; *Story's Eq. Jur.*, 2nd ed., sec. 185. The Crown had a right to choose the forum in which to sue: *Comyn's Digest*, vol. 7, p. 89; *Chitty's Prerog.*, 244, 245, 257; *Attorney-General v. Galway*, 1 Mollo 103; *Regina v. Taylor*, 36 U. C. R. 190. Since the claim is for a debt due to the Crown, and is the enforcement of a claim of a civil nature, it is to be enforced by civil procedure, as distinguished from criminal procedure. It clearly was intended by the Parliament of Canada that such a right as this should be enforced by the ordinary methods of civil procedure in the various provinces. Where the Crown resorts to the tribunals of a Province having jurisdiction in civil cases, it must sue according to the procedure provided for civil cases by the Legislature of the Province. The A. J. Act of 1873, R. S. O. ch. 49, sec. 21, and R. S. O. ch. 40, sec. 86, have in effect clothed the Court of Chancery with the same jurisdiction as that possessed by the Courts of Common Law, so that having regard to the procedure or juris-

diction of the Court the respondent had a right to proceed in equity for the recovery of the duties payable to the Crown. Although particular methods of enquiry were provided for, and required to be made by the officers of the Inland Revenue Department, they were not intended to, and did not take away the right of the Crown to recover the duties payable to the Crown, but the Crown had the right to recover these at any time.

June 25, 1878. Moss, C. J. A. (a), delivered the judgment of the Court.

The first objection raised by the appellant is, that the information discloses a purely legal demand, and shews no grounds for equitable relief. To this it is answered that the Crown has an unqualified right to select its own forum, no matter what the nature of its claim may be, and that at any rate the information does shew proper grounds for equitable interference, because there are long and complicated accounts, and because of the defendant's fraud.

There is force in the argument that the matters of account sought to be investigated bring the case within the scope of the doctrine laid down in *Falls v. Powell*, 20 Gr. 465, and that on this single ground the jurisdiction might be maintained.

But for reasons that will appear presently, we do not think it necessary to pursue this branch of the enquiry. The learned Judges in the Court below were of opinion that the Crown has an inherent right to select the Court of Chancery for the prosecution of even a purely legal demand.

This position was contested by Mr. Richards in his learned argument for the appellant, and he also urged that even if the Crown enjoyed such a right in England, it did not extend to this country, where the Court is only invested with the jurisdiction expressly conferred by the statute.

Assuming these positions to be established, he next

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argued that the case is unaffected by the provisions of the Administration of Justice Act.

It will be convenient to examine this proposition first, because if it fails it is unnecessary to consider the preceding questions. The various provisions of the Act were subjected to a rigid scrutiny for the purpose of shewing that it was not meant to extend to Crown cases, or at any rate to cases prosecuted by the Crown as representing the Dominion. That, however, is a somewhat broader question than is really raised by this demurrer. The true enquiry is, whether this particular demand for the recovery of duties of excise can be prosecuted in the Court of Chancery of this Province. The answer must be sought in the legislation of the Parliament of the Dominion upon the subject.

Now the 155th section of the Inland Revenue Act of 1867, by which this information is governed, enacts that all duties of excise payable under the Act, shall be recoverable with full costs of suit as a debt due to Her Majesty, in any Court of competent civil jurisdiction. Parliament thus exercised its undoubted right of using the ordinary Provincial tribunals for the enforcement of such a demand on behalf of the Crown.

When proceedings are taken before any tribunal for recovery of these duties, and the jurisdiction is impugned, the sole question is, whether it is a Court of competent civil jurisdiction for the recovery of a debt of the amount claimed. Thus the problem is reduced to the enquiry whether, when this information was filed in Chancery, that was a Court in which a demand for a legal debt could be enforced. Of this the Administration of Justice Act furnishes the ready solution, when it enacts that no objection shall be allowed on demurrer, or upon the hearing of any cause in the Court of Chancery, upon the ground that the subject matter of the suit or other proceeding is exclusively or properly cognizable in a Court of law. The obvious effect of this was to entitle a subject to sue his fellow subject in the Court of Chancery for the recovery of a legal debt.

It follows, that in April, 1877, when this information

was filed, the Court of Chancery was a Court of competent civil jurisdiction, within the meaning of the 155th section of the Inland Revenue Act, and was a tribunal to which Her Majesty was entitled to resort by virtue of the Dominion Legislation.

It will be observed that this conclusion is arrived at without the necessity of dealing with the arguments adduced to prove that the Administration of Justice Act does not extend to Crown cases generally.

It is finally argued that the Crown cannot maintain such a suit in any Court, because the specific remedies given by the Act are all to which the Crown can resort. The general scope of the Act, it was argued, shewed that the Legislature was establishing a sort of domestic forum by the machinery of the department, but special stress was laid upon the 43rd and 44th sections. The first of these clauses provides that the duty upon spirits shall be charged and computed in five specific modes, and that that method of computation which yields the greatest amount of revenue shall, in all cases, be the one on which the distiller shall pay the duty. The second enacts, that for the purpose of computing the duty, certain steps and proceedings shall be taken with reference to each of the five prescribed methods. If the Inspector of Inland Revenue has cause to doubt the correctness of certain entries directed to be made, he may cause an enquiry to be conducted by any inspecting officer, and extensive powers are conferred for the purpose of enabling him to prosecute the investigation with effect.

These enquiries may be extended over any period not more than one year before the investigation is commenced; and if it is found that during the said period the returns have been made for, and the duty charged on, a less quantity of spirits than is ascertained and determined by the result of such enquiry, the additional duty then determined shall become due and payable within five days after the distiller has been notified of the result of such enquiry, and the payment of such additional duty shall

be enforced in the same manner and under the same conditions and penalties as the payment of the duty mentioned in the semi-monthly returns. The determination of the officer, if disputed, is to be treated as *primâ facie* correct. Now, if the Act contained no other provisions affecting this question, it would appear to be inconsistent with sound rules of interpretation to give it the narrow operation contended for upon the demurrer.

The sections which have just been summarized are applicable to cases where the distiller has been making his returns without any fraud or dishonesty, but where the adoption of one of the modes mentioned in the Act, and computation in accordance with its principle, would render him liable for a larger amount of duty.

It is impossible to find in these sections any trace of an intention to restrict the right of the Crown to sue in respect of frauds committed upon the revenue to the period of a year, or to prevent recovery in a Court of law unless a special investigation has been held in pursuance of the Act. But we are not left to mere inference, for the 11th sub-section of the 31st section, by its express terms, sweeps away the whole argument of the defendant.

It pointedly enacts that the duties shall accrue and be levied on the quantities made or manufactured, which may be ascertained in the manner provided in the Act, "or otherwise proved." This provision escaped attention upon the argument, but we apprehend that its effect is beyond doubt.

The appeal must be dismissed, with costs.

Appeal dismissed.

IN RE MORTON.—MOLSON'S BANK V. MACCRAE.

Insolvency—Right to security—Ex parte Waring.

M. borrowed \$1,500 from M. & Co., giving them as security a chattel mortgage, and his promissory note at three months, which they discounted at Molson's Bank. No assignment of the mortgage was ever made to the Bank, nor did they deal with M. & Co., in reliance on it. When the note became due, M. & Co., paid \$600, and renewed for \$900. Shortly afterwards, both M. and M. & Co. became insolvent, and the bank claimed the benefit of the mortgage.

Held, affirming the judgment of the County Court, that the bank was not entitled to a prior claim upon the security over the assignee of M. & Co., in respect of the \$600, and that the rule in *Ex parte Waring* gave them no assistance.

THIS was an appeal from the Judge of the County Court of the County of Essex.

It appeared that one Robert Morton, carrying on business in Windsor, obtained an advance of \$1,500.00 from MacGregor Brothers, giving them a note for that amount, and also a mortgage upon some chattels. This note was discounted by the MacGregors with Molson's Bank, and when it fell due it was taken up by the MacGregors, \$600 being paid in cash, and a new note for \$900 made by Morton given by them. Morton really paid nothing, but gave the MacGregors a second note for \$600, which they kept. The bank was not at the time of the discounts aware of the existence of the chattel mortgage. Subsequently Morton became insolvent, as also did the MacGregors, and the Molson's Bank applied to the Judge of the County Court for an order declaring them entitled to the benefit of the chattel mortgage as being the holders of the \$900 promissory note. The Judge made an order declaring the estate of the MacGregors entitled to the chattels, up to the value of \$600, and the Bank only entitled to any surplus over that sum; basing his decision upon the ground that although the bank would have been entitled to what they asked if they had applied in time, they had lost their rights by delay in moving. From this order the bank appealed.

The case was argued on the 25th April, 1878, before Moss, C. J. A., sitting alone in Insolvency.

F. Osler, for the appellant. The Judge has held that we are deprived of our rights by laches, resting his judgment on *Wulff v. Jay*, L. R. 7 Q. B. 756; but the facts of this case are clearly distinguishable, as we never took possession of the goods, and the MacGregors' estate has not suffered any loss through laches on our part. Although the mortgage was not assigned to us, the transfer of the note operated as an assignment in equity, and entitled us to stand in the position of assignees of the mortgage: *Powell on Mortgages*, 6th ed., 907, 908; *Matthews v. Wallwyn*, 4 Ves. 118; *Roberts on Frauds*, 271-275, and 470-471; *Washburn on Real Property*, 3rd ed., 217; *Herman on Chattel Mortgages*, ch. 17, p. 417; *Johnson v. Hart*, 3 Johns. (Chy.) 329; *Page v. Pearce*, 26 N. H. 6.

H. J. Scott. The decision cannot be supported upon the reasoning of the learned Judge, but it is correct. The doctrine in equity that the holder of a debt or promissory note is entitled to any securities attached to that note, whether assigned or not, depends upon the case of *Ex parte Waring*, 19 Ves. 344, which case was followed by *Ex parte Copeland*, 3 Dea. & Ch. 199, *Ex parte Prescott*, 3 Dea. & Ch. 218, *Ex parte Smith*, 4 D. & C. 579, and is not based upon the principle of an equitable assignment, but upon the doctrine that where a Court of equity finds certain property appropriated to a certain debt, or, as it were, ear-marked, it will hand over such property to the person who is entitled to the debt, independent of any question of assignment. This case would be analogous if the bank was entitled to the whole \$1,500. But the MacGregors, while holding a portion of the debt, were clearly entitled to apply any security they might have in payment of their portion first. As between them and the bank the question was merely one of contract, and the bank was not entitled to any benefit from the mortgage as a matter of contract, as they got all they bargained for in getting the note. If during the currency of the note they had found out about the chattel mortgage they could

not have prevented the mortgagors from discharging it, and the holding of the mortgage by the Macgregors shews that they intended it for their own security first.

June 28th, 1878. Moss, C. J. A. (a)—This is an appeal from a decision of the learned Judge of the County Court of Essex, who has made an order of a very special kind in the matter of the insolvency of one Robert Morton.

Morton was carrying on business in or near Windsor, in the course of which he was obtaining accommodation from MacGregor Bros., who were carrying on business as bankers in that town. They have also been placed in insolvency.

Morton borrowed \$1,500 from MacGregor Bros., and gave them a chattel mortgage, dated 1st March, 1876. He also gave them a promissory note at three months, for the sum of \$1,500, which promissory note was discounted by them with Molson's Bank.

When that promissory note became due, MacGregor Bros. paid the bank \$600 on account, and renewed for \$900. In point of fact they obtained two promissory notes from Morton, one for \$600 and the other for \$900, and they used the \$900 note.

No assignment was ever made of the mortgage to the bank, and I find as a fact on the evidence that the bank did not deal with MacGregor Bros. in reliance upon this security, or in the expectation of ever receiving any assignment. MacGregor Bros. having gone into insolvency, the bank now claims that it is entitled to the benefit of the \$1,500 chattel mortgage.

The Judge has found that they are not entitled, at any rate to the full extent. He puts his judgment, as well as I have been able to gather its full effect, upon the ground that the bank, being in the position of mortgagees, have been guilty of such laches and negligence as to disentitle themselves to now assert a right to this property.

He also seems to have thought that they were guilty of neglect in not obtaining a registration. I can scarcely comprehend upon what view of the obligation of the

bank registration by them was supposed to be necessary or even possible; but, at any rate, he held that they were guilty of such laches and negligence as, upon the authority of some English cases to which he referred, has disentitled them to enjoy the position they now assert.

There are two very obvious answers to the learned Judge's reasoning.

In the first place the bank could not be guilty of laches in not realizing upon this property, for they never held the property. It had never been transferred to them in any way; and it is impossible to conceive any manner in which they could have proceeded to have actively asserted the rights of actual mortgagees.

In the second place the cases upon which the learned Judge relies were cases decided upon the construction of the clauses in the English bankruptcy laws relating to the order and disposition of property, and it is well known that we have no corresponding provisions in our law.

If therefore the case had to be determined upon the view that was presented to, and apparently adopted by, the learned Judge, I should think the appeal against the learned Judge's decision must be allowed; but Mr. Scott, who argued the case extremely well, put the case upon a totally different footing, which I think is tenable.

He argued that upon the true understanding of the well known case of *Ex parte Waring*, 19 Ves. 344, the bank was not entitled to claim any priority in respect of the \$600. He conceded that if there had been no payment made at all on account of this note of \$1,500, but the transaction had remained as it was originally, the bank holding the note would be entitled to the benefit of the security, and in order to work out the equities between the parties according to the law laid down in *Ex parte Waring*, they would now be entitled to priority up to the amount of the note upon its proceeds; but he argued, and I am of opinion correctly, that the payment of the \$600 by MacGregor Bros. made all the difference. By that payment the transaction was divided into two portions, and the rule in *Ex parte Waring*

has not the effect of giving the bank any equity in the mortgage security with respect to the \$600.

The rule in that case has been very fully considered in the case of *Allchin v. Buffalo*, 23 Gr. 411, and I think that the language of Proudfoot, V. C., is precisely applicable to this case, and in entire accordance with established authority. He says, at p. 429:—"When, however, he has paid some but not all, and the security was given for his indemnity, all that the holder of the notes can require is, that what remains, after indemnifying the endorser, should be applied for his benefit. Were any other rule to prevail, I would be taking away from the persons who really owned the security the value of it." Every word of it is precisely applicable to this case. If we were to accede to the contention here, that the bank was entitled to be indemnified to the extent of \$600, and have a prior claim for that, as was contended for, we should be taking away this security from the persons really entitled to it, the creditors of the MacGregors' estate.

I think, therefore, that the conclusion at which the learned Judge arrived is correct, and that this appeal must be dismissed; but as the appeal was certainly invited by the way in which the case was put, and as I have not the least idea that it was ever presented in the true light until it was argued by Mr. Scott, I do not think that I can give any costs.

Appeal dismissed.

MAY QUI TAM V. MIDDLETON.

Inland Revenue Act—Conviction—Return of—R. S. O. c. 76.

Section 165 of the Inland Revenue Act, 31 Vic. ch. 8, D., prescribes that "the pecuniary penalty or forfeiture incurred for any offence against the provisions of this Act, may be sued for and recovered before any two or more justices of the peace, * * and any such penalty may, if not forthwith paid, be levied by distress, * * or the said justices may in their discretion commit the offender to the common goal until the penalty * * be paid."

The plaintiff, who was tried under the above Act for distilling spirits without a license, before the defendant and three other justices of the peace, and was ordered to pay \$200, sued the defendant for not making a return thereof under R. S. O. ch. 76.

Held, affirming the judgment of the County Court, that the defendant was liable, as the adjudication in question was a conviction within the meaning of R. S. O. ch. 76, and not a mere order for the payment of money.

APPEAL from the County Court of the County of Grey.

On the 29th of May, 1877, the plaintiff was tried before the defendant and three other Justices of the Peace for violating the provisions of the Inland Revenue Act of 1867, (31 Vic. ch. 8, D.) by distilling spirits without having procured a license. The magistrates adjudged him to forfeit and pay the sum of \$200, to be paid and applied according to law, and to pay to the collector of the division his costs, and ordered that in default of payment these sums should be levied by distress and sale of the plaintiff's goods and chattels. A formal conviction or order embodying these adjudications was signed and sealed by the defendant and the other magistrates. On the 15th of August, 1877, a return and this conviction were received by the Clerk of the Peace, but the plaintiff had two days before commenced this action, in which he sued under the statute on account of the failure to make the return on or before the 2nd of June.

The case was tried before the Judge of the County Court of the County of Grey, who entered a verdict for the plaintiff. Afterwards a rule *nisi* to set aside the verdict was discharged. The defendant appealed.

The case was argued on the 15th March, 1878 (a).

C. Robinson, Q. C., for the appellant. The order in question is not a conviction so called : it is a mere order for the payment of money ; and in such a case no duty is imposed on the magistrate to make a return under R. S. O. ch. 76. The Inland Revenue Act, 31 Vic. ch. 8, D., provides for two classes of cases. Under sections 127, 156, 165, 168, and 169, the penalty or forfeiture incurred for any offence against the provisions of the Act is of a civil nature, the words used in section 165 being, "may be sued for and recovered," language which is clearly applicable to civil proceedings only. The punishment, however, provided for the infringement of sections 139, 143, 145, or 146 is of a criminal character. Moreover, section 168 draws a distinction between a prosecution and any suit, which plainly shews the two-fold character of the Act. No return was necessary in this case, as the penalty in question was, under the sections above referred to, a debt sued for and recovered, and not in the nature of a fine consequent upon conviction. He referred to *Ranney qui tam v. Jones*, 21 U. C. R. 370 ; *Regina v. Eaton*, 2 T. R. 285 ; *Lindsay v. Leigh*, 11 Q. B. 455 ; *Exparte Hayward*, 3 B. & S. 546 ; *Paley on Convictions*, 157-159.

S. J. Lane, for the respondent. The amount forfeited under section 127, sub-sec. 1, is a fine, and the method of recovering the same under sec. 165 is by conviction. It is clear that the proceedings under that section are in the nature of criminal proceedings, as imprisonment is allowed. The fact that the penalty may be sued for and recovered in a Court of law does not affect the necessity of making a return if proceedings are taken under section 165. He referred to *Bagley qui tam v. Curtis*, 15 C. P. 366.

May 23, 1878, (a). Moss, C. J. A., delivered the judgment of the Court.

The duties imposed upon Justices of the Peace with regard to returns, are prescribed in Consol. Stat. U. C. ch. 124, sec. 1,

(a) *Present*.—MOSS, C. J. A., PATTERSON, and MORRISON, JJ. A.

as amended by 32 Vic. ch. 6, sec. 9, sub-sec. 4, O. For our purpose it is sufficient to refer to the consolidation in the Revised Statutes ch. 76, sec. 1. From this it appears that "every Justice of the Peace before whom any trial or hearing is had, under any law giving jurisdiction in the premises, and who convicts and imposes any fine, forfeiture, penalty, or damages, shall make a return thereof, and of the receipt and application by him of the money received from the person convicted, in writing under his hand, quarterly, on or before the 2nd Tuesday in each of the months of March, June, September, and December, in each year, to the Clerk of the Peace, (and in the case of any convictions before two or more Justices, such Justices being present and joining therein, shall make an immediate return thereof)" according to a prescribed form. It is clear that the defendant made no return of the adjudication in question conformable to this provision of the law, and he is therefore *prima facie* liable in this action. His claim to exemption from this penalty is rested upon the contention that the adjudication is not a conviction in the proper sense of the term, but is in the nature of an order or judgment for the payment of money merely. It is observed that the record is in form of a conviction, for the language used is that the present plaintiff "is *convicted* before the undersigned" for distilling spirits without a license under the Act, and it then proceeds to adjudge the forfeiture and to provide for the enforcement of payment by distress. But I do not think that too much importance ought to be attributed to the mere form, or that the defendant ought to be fixed with liability because certain expressions are used in the record, if the proceeding was not in substance a conviction within the meaning of the statute.

The learned counsel for the defendant pointed out that the magistrate is only bound to make a return when he convicts and imposes any fine, forfeiture, penalty or damages, and that the statute is silent as to any return of mere orders made by him for the payment of money. In illustration of the view that no return is necessary where

the adjudication is a mere order for the payment of money reference was made to the case of *Ranney qui tam v. Jones*, 21 U. C. R. 370. That is an authority for the proposition that the mere order upon a master to pay the amount of wages due to a servant is treated as something different and distinct from a conviction, being no more than a summary mode of enforcing and collecting a debt. Some time since the consideration of a case before this Court suggested to me the attempt, which I made without much success, to discover some clear line of demarcation between a magistrate's conviction and order under our law. I was inclined to think that the distinction indicated by Parke, B., in *Lindsay v. Leigh*, 11 Q. B. 455, was not recognized by our statutes. In that case he used the following language: "It is just as competent to the Legislature to authorize a magistrate to exercise a summary authority, out of the course of the common law, by a simple order which shall be delivered to the person who is to execute it, and be his warrant for so doing, and remain in his custody, as it is to authorize him to proceed by summons and conviction (which has to be filed at the sessions), and commitment thereon, though the latter is by far the more usual course." But if that does furnish the proper test, this instrument seems to fall within the latter class, for it opens with the recognized formal commencement:—*Be it remembered, &c.*, and thus differs from a simple order. The argument to the contrary is founded upon the special provisions of the Inland Revenue Act, 31 Vic. c. 8, D., to which it will be necessary briefly to refer.

It is enacted in the 127th section, that any person who, after the passing of the Act, and without having a license under it then in force, shall distil any spirits, shall forfeit and pay a penalty of \$200. By the 139th section it is provided that any person who shall refuse or neglect to aid any officer of the revenue in the execution of his duty, shall be guilty of a misdemeanour, and on conviction thereof shall be subject to a penalty of not less than \$50, nor more than \$100, and shall also be liable to imprisonment. By the

143rd section, a person who does any of certain enumerated acts in contravention of the statute, is declared guilty of felony. By the 145th section, any person obstructing, impeding, or interfering with an officer or his assistant in the discharge of his duty, is declared guilty of a misdemeanor. The 156th section provides that "all penalties and forfeitures incurred under this Act, * * may be prosecuted, sued for and recovered in the Superior Courts of law or Court of Vice-Admiralty having jurisdiction in that Province in Canada where the cause of prosecution arises, or wherein the defendant is served with process." By section 165, upon which special stress is laid on behalf of the defendant, it is enacted that "the pecuniary penalty or forfeiture incurred for any offence against the provisions of this Act, may be sued for and recovered before any two or more Justices of the Peace having jurisdiction in the place where the offence was committed, on the oath of two credible witnesses; and any such penalty may, if not forthwith paid, be levied by distress and sale of the goods and chattels of the offender, under the warrant of such Justices; or the said Justices may, in their discretion, commit the offender to the common gaol, until the penalty with the costs of the prosecution shall be paid." All sums of money paid or recovered for any penalty or forfeiture under the Act, or any part thereof belonging to Her Majesty, are to be paid to the Receiver-General, and to form part of the Consolidated Revenue Fund.

Upon these provisions it is argued that the pecuniary penalty or forfeiture incurred for any offence is merely the subject matter of a civil suit, which may be instituted in any Court having *civil* jurisdiction, and that the jurisdiction conferred upon magistrates is merely substituted or alternative. It is argued that the Act contemplates two classes of offences against its provisions, and assigns different modes of punishment, the one being of a civil and pecuniary character, as the recovery of penalties, and the other being of a criminal character, as in case of violations of the 139th, 143rd, 145th, or 146th section. It is further insisted that the expression "may be sued for and recovered," employed in the

165th section, is only appropriate to a civil proceeding, and does not contemplate a conviction properly so called.

The answers to these arguments are, I think, on the surface. In the first place what may be sued for and recovered is expressly designated as a penalty or forfeiture; and the statutory duty of the magistrate is to make a return when he convicts and imposes any fine, *forfeiture, penalty*, or damages. The case, therefore, seems to fall within the explicit language of the Act. But there are broader considerations which unmistakeably conduct us to the same conclusion. If the Parliament of the Dominion assumed to provide this machinery for the collection of a mere debt, it would in effect be creating special Civil Courts, and would be transcending its powers. It had already provided, as it had a right to do, for a resort to the ordinary civil tribunals for the recovery of the pecuniary demand. In conferring this jurisdiction upon any two magistrates, it must be taken to have acted in the exercise of its authority to regulate the criminal law,

Again, if this were to be treated as a mode of procedure for the recovery of a debt, it would follow that the Dominion Parliament had endeavoured to make a breach in the Provincial law, which prohibits imprisonment for non-payment of a debt; for, as we have seen, the enactment expressly authorizes the magistrates in their discretion to commit the *offender* (not the defendant or debtor) to gaol until the penalty and costs are paid. We are saved from the necessity of attributing any such intention to Parliament by holding that it simply extended to these particular offences the ordinary criminal jurisdiction exercised by magistrates. It cannot be plausibly argued that this is a case in which Parliament has exercised the right conferred upon it by the 101st sec. of the B. N. A. Act of establishing additional Courts for the better administration of the laws of Canada.

We have no hesitation in arriving at the conclusion that the defendant was bound to make a return, and that the appeal must be dismissed, with costs.

Appeal dismissed.

ADAMS V. WOODLAND ET AL.

Insolvent Act, 1875—Debt barred by discharge—Promise to pay.

Held, reversing the judgment of the County Court, that a promise to pay a debt from which a discharge under the Insolvent Act of 1869, had been obtained, is founded on a good consideration, and may be enforced.

Appeal from the County Court of the County of York.

This was an action on certain promissory notes, dated 30th October, 1876, made by the defendant Woodland and endorsed by the defendant Bell. Judgment was signed against Bell for default of appearance. Woodland, amongst other defences, pleaded an assignment in insolvency by him on 17th February, 1873: that before and at the time he assigned he was indebted to the plaintiff for \$500 for money loaned, which was a debt capable of being proved in insolvency: that it was set forth in the statement of his affairs, and proved for by the plaintiff, who obtained a dividend thereon: that he was discharged from the said debt by a deed of composition and discharge and order confirming the same, and that the plaintiff induced him to give the notes in the declaration mentioned for securing payment of the debt so discharged, and for no other consideration.

The case was tried before McKenzie, County Judge, at the Spring Assizes for the county of York.

It appeared that at the time of the defendant's insolvency the plaintiff held a certain promissory note made by Woodland, and endorsed by Bell as surety, to secure a sum of money which Adams had previously advanced to Woodland: that the plaintiff proved on the estate for the amount of the note, and received a dividend thereon; and that the defendant received his discharge on the 7th March, 1874.

Evidence was given to prove that the consideration for making the note was forbearance to Bell. The jury, however, found that the note was not given for the purpose of preventing Bell being sued or extending time to him, and a verdict was rendered for the defendant.

Subsequently a rule *nisi* to set aside the verdict, as contrary to law and evidence, and to enter judgment for the plaintiff on the fourth plea *non obstante veredicto*, was discharged.

The plaintiff appealed.

The appeal was argued on September 3rd, 1878 (a).

Rose, for the appellant. The case of *Austin v. Gordon*, 32 U. C. R. 622, shews that the 4th plea is bad in law, as the authorities establish that the moral obligation to pay a debt discharged in bankruptcy forms a perfectly good consideration for a subsequent promise to pay the same.

Akers, for the respondent. No one appeared in support of the plea in *Austin v. Gordon*, and several cases in the English Courts in favour of it were not cited. The cases clearly prove that such a promise is a mere *nudum pactum*: *Jones v. Phelps*, 20 W. R. 92; *Heather v. Webb*, L. R. 2 C. P. Div. 1; *Wade v. Simeon*, 2 C. B. 563; *Graham v. Johnson*, L. R. 8 Eq. 36; *Edwards v. Baugh*, 11 M. & W. 645.

September 16th, 1878 (a). BURTON, J.—I think we may hold quite consistently with the cases which were cited to us on the argument, that the fourth plea affords no answer to the plaintiff's claim.

Under the English Bankruptcy Acts, prior to 6 Geo. IV. c. 16, there is an abundance of decisions to be found, to use Lord Coleridge's words, from Lord Mansfield's time down to Baron Parke's, holding that an action was maintainable upon a promise to pay a debt from which a party sought to be charged had been freed by discharge in bankruptcy, the Courts holding that, although the remedy was taken away by express legislative enactment, and the payment of the debt remained simply a voluntary duty, binding only in *foro conscientiae*, still an express promise operated to revive the liability and take away the exemption.

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These judicial decisions, which have always been treated as good law, received, it may be said, legislative recognition in the statutes I have referred to, which limited the right to recover in such cases to promises made in writing. The policy of subsequent statutes in England was to prohibit the enforcement of any engagement to pay a debt once barred by bankruptcy, and under the Acts of 1849 and 1861 the promise could not be sued upon, whether verbal or written.

Then came the Act of 1869, which repealed all the prior bankruptcy Acts, but that Act contains no such provision as was contained in the former Acts, making a promise, whether verbal or written, to pay a debt so discharged invalid.

Two cases are cited apparently opposed to the earlier decisions, which have occurred since the passage of the Act of 1869. One is the case of *Jones v. Phelps*, 20 W. R. 92, and the other *Heather v. Webb*, L. R. 2 C. P., D. 1. In the former of these, where it was not necessary to decide the point, as the bankruptcy was under the Act of 1861, Bacon C. J. did broadly base his decision on the ground that where a debtor was discharged from a debt by bankruptcy, a promise by him to pay it was a mere *nudum pactum*, and, therefore, according to a well-known principle of our law, would not sustain an action.

The report of the judgment is a very meagre one. If the decision was made under the erroneous impression that it was to be dealt with under the Act of 1869, and had proceeded upon the difference in the phraseology of that Act and those that preceded it, it is intelligible enough, as the order of discharge under the Act of 1869 *releases* the bankrupt from all debts provable under the bankruptcy; and if it be used in its technical sense, its effect would of course be, not merely to bar the remedy, but to extinguish the debt, and that seems to be the view taken of it by Lord Blackburn, in *Thomson v. Cohen*, L. R. 7 Q. B. 527, where he says, at p. 532: "The word used is, '*released*' from the debt, the debt was in fact gone. If on the other hand the decision does not proceed upon this

ground, it is opposed to the long current of decisions to which I have referred, supported as they are by legislative recognition. It was at most a *dictum*, and in the subsequent case of *Rimini v. Van Praagh*, L. R. 8 Q. B. 1, in which *Jones v. Phelps*, 20 U. C. R. 92, was cited, the Chief Justice expressly guarded himself against any expression of opinion, not deeming it material to the decision of that case.

The other case might also have been decided—if Lord Blackburn's view be correct—on the short ground that the debt was gone, and not the remedy only barred, and the promise, therefore, was without consideration, and void. It will be seen, however, that in that case the claim was upon the old debt which accrued before the bankruptcy proceedings. The defence was to that claim, and then the plaintiff replied a subsequent promise. Great stress was laid by the learned Judges upon the concluding portion of section 49, which is as follows "And in any proceedings that may be instituted against a bankrupt, who has obtained an order of discharge, in respect of any debt from which he is released by such order, the bankrupt may plead that the cause of action occurred before his discharge, and give the act and the special matters in evidence." It was impossible, therefore, to say that that action was not a proceeding in respect of a debt from which the defendant was released. The Court also referred to the significant fact that ever since the Act of 1849 the policy of the bankrupt law had been to prohibit the enforcement of such promises, and that the Legislature could not have intended, without an express declaration to that effect, to make so sweeping a change, the general policy of that enactment being much more strongly against such revival of liability than in the previous Acts.

Our Legislature has never thought proper to interfere in this direction. The bankrupt is freed from his debts, and cannot be harassed by legal proceedings. If he voluntarily throws away the shield the law has furnished him, that is his affair, and there is no good reason, that I can discover, either in morals or law, to prevent his doing so,

or to warrant his appeal to the Courts to relieve him from payment of a just debt, which he has voluntarily re-assumed.

I take it that upon these pleadings all that is intended to be set up is the statutory discharge, and not that the plaintiff has, by executing a deed containing an absolute discharge, thereby released the debtor. The case was argued on that footing. I do not think that the cases cited warrant the defendant's contention, and am of opinion that the fourth plea contains no answer to the plaintiff's claim.

The appeal, therefore, should be allowed, and the rule made absolute to enter a verdict for the plaintiff *non obstante veredicto*.

PATTERSON, J. A.—I am quite unable to distinguish the effect of our Insolvency Act from the effect of the English Bankruptcy Acts of Geo. II. and Geo. IV., under which it was held that the debt remained, although the remedy was gone, and was therefore a sufficient consideration for a promise to pay it.

The expression used in the English Acts of Geo. II. and 6 Geo. IV. ch. 16, "The debtor is discharged from the debt," is the same as that used in our Insolvency Act, and the consideration given to the decisions under that Act by Mr. Justice Wilson in a case which has been referred to, and which the learned Judge of the County Court in his judgment seemed to think were properly considered as stating the law as it should be held, seems to dispose entirely of the matter, as far as we have to deal with it. The later cases under the English Bankruptcy Act now in force, which have been referred to, seem distinguishable, or at all events to proceed upon grounds that do not afford any analogy so strong as to outweigh the similarity that exists between the provisions of our Act and the old English bankruptcy laws. The distinction taken by Lord Blackburn, which has been referred to, as to the later English Act containing the word "release," where the former contained the word "discharge," is not one having any substance in it. I cannot see the difference between the one word

and the other myself. I think the reason given by Lindley is probably the better reason for the distinction. He says: "The plaintiff's counsel argues that the effect of the omission in the present Act of the special provisions with regard to promises to pay debts barred by bankruptcy that were contained in the former Acts, is, that the general proposition above referred to applies, and the law is altered in the plaintiff's favor. To that argument, I cannot accede. The provisions of the present act by which many liabilities are made provable under the bankruptcy which formerly were not provable, shew that the intention is that the bankrupt shall be more completely discharged from his liabilities than under previous Acts."

This reasoning seems to be scarcely applicable to our Act, which has no larger operation in making liabilities provable than had the English Bankruptcy Acts prior to 1869, and therefore notwithstanding these later decisions, it seems to me that we are bound to follow the law as it was laid down in the earlier cases, and hold that an express promise to pay a debt from which a discharge in insolvency has been obtained, is founded on a consideration which will support an action.

Moss, C. J. A.—I concur so entirely in the conclusion at which my learned brethren have arrived that I would feel it unnecessary to add a word, were it not for the importance of the question under review.

The allegation of the defendant Woodland with respect to the notes in question was two-fold. In the first place he contested the plaintiff's position that the true consideration for the making of the notes after the discharge in insolvency was that the plaintiff undertook to give time to Bell. It will be observed that after the insolvency the plaintiff was in a position to take proceedings against Bell as endorser, of whatever value these might have proved; and the plaintiff's contention was that in order to save Bell from proceedings, the defendant Woodland was willing to give him these notes after the discharge, and to procure

Bell's endorsation to them. That issue was submitted to the jury, and although there was a great deal to be said in favour of the plaintiff's view, the jury found in favour of the defendant, and it is not now sought to impeach that finding.

The defendant also relied upon the broad general defence, that this note having been given after the discharge, and without any other consideration than the debt which had been previously discharged in insolvency, a promise to pay it was not enforceable.

The learned Judge of the County Court adopted that view of the law. It was urged upon him that it had been decided differently in *Austin v. Gordon*, 32 U. C. R. 622, by our own Court of Queen's Bench, but he did not consider that case to have been well decided or binding upon him, and thought that if the question were now to be considered, the learned Judge who pronounced the opinion of the Court on that occasion would have arrived at a different conclusion. I cannot help thinking that it probably would have been better for the learned Judge to have followed the law as laid down there, and to have left its revision to the parties who chose to carry it to another Court. He suggested, however, that the opinion of this Court should be taken, because he differed from the view which the Queen's Bench had enunciated.

I suppose the learned Judge had before his mind the cases which have been decided in England since *Austin v. Gordon* was considered in the Court of Queen's Bench in this country. But I think it is only necessary to consider the principles upon which *Heather v. Webb*, L. R. 2 C. P. Div. 1, was decided to see that they do not in the least degree disturb the authority of the case in our own Court.

It is clear beyond all question that previous to 6 Geo. IV. it was part of the law of England that a promise made to pay a debt which was provable in bankruptcy, and which was the subject of a discharge, formed a perfectly good consideration. It had been thought that the reasoning upon which that state of the law was founded was not entirely

satisfactory, but it was too firmly established to be shaken by anything but legislative interposition; in truth it was after all, as I take it, only another exemplification of a well established doctrine, that a voluntary promise to pay a debt originally founded upon a beneficial consideration, but the enforcement of which is only prevented by a statutory bar, is sufficient and valid. I do not know that in principle it differed very much from the doctrines that were enunciated in the well-known case of *Flight v. Reed*, 1 H. & C. 703. However that may be, I repeat that that doctrine was too well established to be disturbed by any authority short of the Legislature. Then came the statute 6 Geo. IV., which enacted that no such promise—that is, a promise to pay a debt discharged by proceedings in bankruptcy—should be of any avail, unless the promise were in writing. Clearly, that imported that previous to that statute an unwritten promise unsupported by any other consideration than the previous obligation was enforceable.

Subsequent legislation, namely, by the Act of 1849, provided that such a promise, even if in writing, should no longer be enforceable, and that provision was continued in the Act of 1861.

There was, therefore, no doubt about the state of the law in England previous to the Act of 1849. Up to 6 Geo. IV. ch. 16, such a promise was enforceable, although not in writing, and although founded upon no other consideration than the existence of the antecedent debt which had been discharged in bankruptcy. Between 1826 and 1849 such a promise was enforceable if reduced into writing. Between 1849 and 1861 such a promise was not enforceable. Then the Act of 1869 was passed, which omitted the clauses contained in the previous Act of 1849 that such promises should not be enforceable even if reduced to writing. It substituted for it, or, at any rate, it contains, a clause that no such action shall be brought, and that in any proceedings instituted against a bankrupt who has obtained an order of discharge in respect of any debt from which he is released, the bankrupt may plead that the cause of action occurred before the discharge.

Now, *Heather v. Webb* was a case in which it was attempted to maintain that since the Act of 1869 the old state of the law had been revived; and as I understand the report, the argument of the plaintiff was that as the statute of 1869 did not re-enact in express terms those provisions of the previous statutes, which declared such promises not enforceable, the old state of the law was revived. The Court, as I read the decision, did no more than to refuse to accede to that contention. It held that it would be quite contrary to all sound principles of interpretation to lay down that the Legislature had intended deliberately to change its policy, in any such indirect and collateral manner.

The other point on which the Court mainly relied in *Heather v. Webb* turned upon the words "in respect of any debt." They held, and, I venture to think, were unquestionably right in holding, that the action in that case was a proceeding in respect of a debt from which the defendant had been released by the order in bankruptcy. I think that when that case is properly understood, there is no difficulty whatever. It is a case which has no application in our law, for the simple reason that our Act, all our Insolvency Acts, have not differed materially from the old English Acts upon which it was held that the debt being good *in foro conscientiae* formed a sufficient consideration for the subsequent promise. I say that without any reference at all to the question, whether the general scope of our Insolvent Act is wider than that of the Bankruptcy Acts in England, prior to 1826. I incline to think that our Act is wider in its operation than were those Acts upon which the decisions prior to 1826 proceeded. But that is altogether beside the question. Our Act is identical as to the effect which a discharge shall have upon any claim which is provable in bankruptcy.

This was a claim provable in bankruptcy. It was a claim which was certainly good *in foro conscientiae*. It was a claim with respect to which a subsequent promise was made, and I see no reason, therefore, for placing a different con-

struction upon our statute from that which has been placed by Judges or tribunals of the highest authority upon the English statutes prior to 1826.

The appeal should be allowed, with costs, and judgment entered *non obstante veredicto* in the Court below.

MORRISON, J. A., concurred.

Appeal allowed.

SLOAN V. MAUGHAN.

Chattel mortgage—Renewal of—Statement and affidavit.

Held, affirming the judgment of the County Court, that where the statement and affidavit filed upon renewal of a chattel mortgage, when read together, give all the information required by R. S. O. c. 119, sec. 10, the renewal is sufficient.

The statement was that the interest of the mortgagee in the goods described in the mortgage, of which the annexed is a true copy, and made by C., and dated the 13th of March, 1876, is as follows: The amount still due to me, S., on said mortgage for principal is, \$200. The affidavit stated that the above statement was correct and true, that the mortgage had not been assigned by him, and was not kept on foot for any fraudulent purpose. *Held*, sufficient. *O'Halloran v. Sills*, 12 C. P. 465, remarked upon and distinguished.

The copy filed gave the date of the mortgage as the 13th March, 1877, instead of 1876. *Held*, immaterial, as the mistake could have misled no one.

APPEAL from the County Court of Grey.

Trespass and trover and common counts.

Pleas: not guilty, not possessed, and never indebted.

Issue.

The case was tried before the judge of the County Court of the County of Grey, without a jury.

The question in controversy between the parties was, as to the sufficiency of the renewal of a chattel mortgage under which the plaintiff claimed. It appeared that the defendant, as the sheriff of the County of Grey, by his bailiff, had in the month of July, 1877, seized and sold the mortgaged

goods at the suit of one Wolf et al., who had recovered judgment and issued execution against the goods and chattels of the execution debtor.

The plaintiff put in and proved a chattel mortgage from John P. Cunningham to himself, dated 13th March, 1876, to secure \$210.82, and an alleged renewal thereof, dated 12th March, 1877. The statement and affidavit relating to such renewal were in the words following:

“STATEMENT B.—The interest of Thomas Sloan of the township of Stamford in the county of Welland, Gentleman, the mortgagee in the goods and chattels described in the chattel mortgage of which the annexed paper writing marked “A” is a true copy, and made by John Trafford Cunningham, of the township of Derby in the county of Grey, to the said Thomas Sloan, and dated the thirteenth day of March, one thousand eight hundred and seventy-six, is as follows:—

The amount still due and payable to me, Thomas Sloan, on the said chattel mortgage, for principal is two hundred dollars, according to the following particulars:

Principal	\$210 82
Paid on the above	10 82
	<hr/>
	\$200 00

COUNTY OF GREY, } I, Thomas Sloan, of the village of
To wit: } Drummondville, in the township of
Stamford, in the county of Welland, Gentleman, the mortgagee mentioned in the chattel mortgage of which the annexed paper writing marked “A” is a true copy, make oath and say:

1. That the above statement marked “B” is correct and true.

2. That the said chattel mortgage to which the above statement refers (a copy of which mortgage is hereunto annexed marked “A”) has not been assigned by me, and has not been and is not now kept on foot for any fraudulent purpose.

The learned Judge upheld the validity of the renewal, and entered a verdict for the plaintiffs. Subsequently a rule *nisi* to set aside the verdict was discharged. The defendant appealed.

The appeal was argued on the 13th November, 1878. (a)

Morrison for the appellant. The mortgage was not properly renewed, as the statement does not shew the interest of the mortgagee in the property claimed: *O'Halloran v. Sills*, 12 C. P. 465; *Reynolds v. Williamson*, 25 C. P. 49; *Walker v. Niles*, 18 Gr. 310. The case of *Barber v. Maughan*, 42 U. C. R. 134, upon which the learned Judge proceeded, was erroneously decided. At all events *Barber v. Maughan* is distinguishable from the present case, as there the statement and affidavit taken together shewed what the interest of the mortgagee in the property was, while in this case there is nothing to shew that the mortgagee had any interest in the property. The authorities shew that unless the Act has been fully complied with the mortgage is void. The copy of the mortgage filed was not a true copy. He referred to *Mason v. Thomas*, 23 U. C. R. 205; *Jackson v. Kassel*, 26 U. C. R. 341; *Armstrong v. Ausman*, 11 U. C. R. 498.

S. J. Lane for the respondent. The point taken in reference to the copy of the mortgage filed is merely a clerical error which could not mislead. No form of statement is prescribed by the statute, and a liberal construction should therefore be given to it. The affidavit sufficiently shews the interest of the mortgagee, and it may be read with the statement: *Barber v. Maughan*, 42 U. C. R. 134.

December 6, 1878. Moss, C. J. A. (a)—The single point upon this appeal is whether the statement and affidavit of the mortgagee of chattels made upon a refiling of the instrument are sufficient.

It is conceded that we cannot allow the appeal without overruling *Barber v. Maughan*, 42 U. C. R. 134, for this statement approaches more nearly to what could be required upon the strictest construction of the statute, than did the document upheld in that case. But I do not think that the plaintiff is forced to shelter himself under the authority of

(a) *Present*.—MOSS, C. J., BURTON, PATTERSON and MORRISON, JJ.A.

that decision, for it appears to me that the statement and affidavit afford all the information which the Legislature intended should be given.

I confess that I have always felt some difficulty in assigning any definite meaning to the words "a statement exhibiting the interest of the mortgagee in the property claimed by virtue thereof," as apart or contradistinguished from the amount still due to him for principal and interest. It is difficult to conceive what interest the mortgagee could be supposed to have in the property included in the mortgage except that of being secured for the amount remaining due. The original Act, 12 Vic. ch. 74, sec. 3, did not require the refiling to be accompanied by an affidavit, but it provided for "a statement exhibiting the interest of the mortgagee in the property thereby claimed by virtue thereof." This language was taken literally from an Act of the Legislature of the State of New York, and similar provisions are to be found in enactments of other States of the Union.

The decisions in the States Courts shew that the object of this provision was to give reasonable notice to creditors and subsequent purchasers, and to prevent them from being misled by the apparent ownership of the mortgagor. In *Patterson v. Gillis*, 64 Barb., it was remarked by the Court that the statement required has universally been understood to be a statement of the amount remaining unpaid upon the mortgage. The course of decision in these Courts points to the conclusion that where the statement is made in good faith with reasonable care, and is substantially correct and accurate, it is a sufficient compliance with the spirit and intent of the statute. It seems to me that this construction of the enactment was in accordance with sound principle, and would have been placed upon our statute of 12 Vic., if the question had arisen. If that view be correct, the additional language in 20 Vic. c. 3, sec. 7, "and a full statement of the amount still due for principal and interest thereon and of all payments made on account thereof" might well be treated as inartificial amplification or explanation of the

character of the statement required. That would commend itself as a more reasonable mode of construction than to attribute some new import and significance to the language which was repeated from the earlier statute, especially when the nature of the new statement thus supposed to be introduced is left to conjecture.

But it is strenuously argued that the decision in *O'Halloran v. Sills*, 12 C. P. 465, which has the sanction of the high authority of the late Chief Justice of this Court, demonstrates the insufficiency of this statement and affidavit. It may be observed in the first place that the Courts of later years seemed to have leant in the direction of accepting as sufficient a substantial compliance with the requirements of the Act. The cases of *Walker v. Niles*, 18 Gr. 210, and *Barber v. Maughan*, 42 U. C. R. 134, are salient instances of this tendency. But upon a careful examination of that decision it appears to me that it does not conflict with that which we are now pronouncing. It is true that the learned Chief Justice did use language which seemed to imply that in his opinion the statement must be wholly sufficient in itself and cannot be supplemented by any reference to the affidavit. We are all of opinion that this degree of strictness ought not to be required, and that the more liberal views expressed in subsequent cases ought to prevail. No doubt the affidavit *must* state what the statute expressly requires it to state, but, as the authorities referred to convincingly demonstrate, the statement so called and the affidavit may be read together, and should in fact be deemed to be incorporated. This expression of opinion, however, by the learned Chief Justice was not essential to the determination of the case, although it is no doubt true that he made it the main support of his opinion. But the statement and affidavit when coupled together did not shew that the amount remaining due from the mortgagor was due upon the mortgage.

The former seems to have been simply "statement of amount still remaining due from the mortgagor named in the original bill of sale by way of mortgage of which the annexed is a true copy, that is to say \$212, &c."

By the latter the mortgagee only deposed that the mortgagor was justly and truly indebted to him in the sum of \$224, as set forth in the statement; that the statement was true, and that the mortgage had not been kept on foot for any fraudulent purpose. I confess that I should have been inclined to think that, having regard to the presumable object of the statute, even that statement might have been deemed sufficient, but however that may be a comparison of the documents shews how far short it falls of that with which we are now dealing. The grounds on which the statement was deemed insufficient in that case are thus summarized by the Chief Justice: "This statement does not state that the amount stated to be due is due on the mortgage, or the debt secured by it, nor that it is due to the mortgagee, nor that he is still interested in the property as mortgagee. He may have assigned it, and the assignee may have been paid, and yet the statement as it stands may be true." It is only necessary to refer to the statement and affidavit we are now considering to perceive at a glance that every one of these particulars is fully supplied.

In adjudicating upon the rights of mortgagees under this Act I do not think that we should apply the rules of special pleading, or be astute to destroy honest claims on account of a want of technical precision of language. If the affidavit follows the terms of the statute, and if it and the statement, when read together in the sense in which they would be understood by ordinary English-speaking business men, convey with reasonable fulness and fairness the information that the deponent is still the mortgagee of the goods described in the mortgage, and that a certain sum remains due for principal and interest, and that certain or no payments have been made on account, the intent and spirit of the statute are satisfied. These conditions are amply fulfilled in the present case, and the appeal should be dismissed with costs.

PATTERSON, J. A.—I am of opinion that the judgment appealed from is correct. The statute Consol. Stat. U. C. ch. 45 sec. 10; R. S. O., ch. 119, sec. 10 required that there

should be filed (1) a true copy of the mortgage, together with (2) a statement exhibiting the interest of the mortgagee in the property claimed by virtue thereof, and (3) a full statement of the amount still due for principal and interest thereon and of all payments on account thereof, with (4) an affidavit stating that such statements are true, and that the said mortgage has not been kept on foot for any fraudulent purpose. It has been considered that the case of *O'Halloran v. Sills*, 12 C. P. 465, is an authority for requiring the second and third of these particulars to appear in one document, called a statement, and the fourth in another document called an affidavit. If a decision to that effect had been pronounced by the Court of Common Pleas so long ago as 1862, and had been followed from that time, it would be our duty to follow it, leaving the Legislature to alter the law if the construction it had so received did not meet with approval. But no such point was really decided.

The Court at that time consisted of the late Chief Justice of this Court, the present Chief Justice of the Supreme Court, and my brother Morrison. The first and the last named of these Judges delivered judgments. No judgment was delivered by Sir William Richards, and it does not appear from the report that he was present or took any part in the case. Draper, C. J., and Morrison, J., agreed that some things which the statute made essential were wanting, and for this defect the chattel mortgage then in question was held not to have been renewed in compliance with the law. The Chief Justice expressed the opinion that the statement embodying the particulars which I have numbered 2 and 3 must be complete without reference to the affidavit, and the affidavit complete without reference to the statement; but no such separation of the two instruments is made by Morrison, J., who considered the renewal insufficient because (reading both statement and affidavit) it did not shew what amount for principal and interest was due on the mortgage.

The opinion of the Chief Justice was dissented from by Mowat, V. C., in *Walker v. Niles*, 18 Gr. 210, and the Court

of Queen's Bench in *Barber v. Maughan*, 42 U. C. R. 134, adopted the view of the Vice-Chancellor.

In my judgment we should be applying a rule of construction of a stricter and more technical character than the purpose of the statute requires, if we read it in the literal way suggested by Draper, C. J., or if we held that more was necessary than to furnish the information specified, verified by oath, whether the statement and affidavit be contained in one document or in two, or even in three, which a very literal reading of the statute might be held to demand.

Looking at the statement and affidavit I find a sufficiently distinct statement sworn to by the mortgagee that he still holds the mortgage; that it is not kept on foot for any fraudulent purpose; that the amount still due and payable to him on the mortgage for principal is \$200, being the original mortgage money of \$210.82, less \$10.82 paid; and that his interest in the goods and chattels described in the mortgage is the amount so due to him.

I think the statute has been complied with in the matter of the statement and affidavit.

It is objected that a true copy of the mortgage has not been filed because the date is written 13th March, 1877 instead of 13th March, 1876. The renewal was on the 12th March, 1877; the copy was attached to the statement, in which the original mortgage was described as dated 13th March, 1876, and to the affidavit, which stated the annexed document to be a true copy of the mortgage to which the affidavit referred. There was therefore a simple impossibility of deception or misleading by reason of the slip in copying.

This point is already covered by the authority of the cases of *Armstrong v. Ausman*, 11 U. C. R. 498, and *Walker v. Niles*, 18 Gr. 210, but requires no authority to support a decision against the objection.

I agree that the appeal must be dismissed, with costs.

BURTON and MORRISON, JJ.A., concurred.

Appeal dismissed.

RVR. 6 SCR 634.

6 App. Cas. 644.

MOORE V. THE CONNECTICUT MUTUAL LIFE INSURANCE
COMPANY.*Life insurance—Personal injury not communicated—Attendance by physician
—Power of Court to enter verdict—Costs of Appeal.*

One M. obtained a policy of insurance on his life, issued and accepted on the conditions therein set out, one of which was that the answers in the application, which was made a part of the contract, were warranted by the assured to be true in all respects, and that if the policy had been obtained by any misrepresentation or concealment, it should be void. Among the questions and answers in the application were: No. 8. Have you had any other illness, local disease, or personal injury, and if so of what nature? How long since? What effect on general health? Answer. No. No. 14. How long since you were attended by a physician? For what disease? Give name and residence of such physician? Answer. About thirty years ago. Lake fever. Dr. S. of, &c., now dead. Name and address of your medical attendant? Answer. Dr. B., who attends my family. Has known me for seven years. No. 16. Have you reviewed the answers to the above questions, and are you sure they are correct? Answer. Yes. At the end was a declaration and warranty that the above were fair and true answers to the questions, and an agreement that if there should be in any of the answers any untrue or evasive statements, or any misrepresentation or concealment of facts, the policy should be void.

The evidence shewed that about fourteen or fifteen years before the deceased had been thrown out of a sleigh, and fallen on his head: that there was a depression and loss of part of his skull: that the fall had not affected his general health: that his last illness had occurred soon after a blow upon his head, received by striking against a bolt in his warehouse, close to the depression in his skull: that he was a reckless rider, getting frequent falls: and that during the last ten years he had been attended by other physicians besides Dr. B. above mentioned.

The jury, in answer to questions, found that the insured had no personal injury which must have been present to his mind as coming fairly within the term personal injury: that he had no serious or severe personal injury, which through forgetfulness or inadvertence he did not communicate, nor any personal injury which he might fairly be expected to communicate for the defendants' information, or which had any effect on his general health: and that he had not been attended by any other physician besides Dr. B., except for some trifling ailment.

Held, by PATTERSON, J. A., and BLAKE, V. C., that the answer to the eighth question was a breach of the warranty, as the evidence clearly shewed that the injury arose from a fracture of the skull, which was produced by the fall from the sleigh, and the assured was bound to mention an injury so severe and unusual, whether it affected his general health or not.

Per BURTON, J. A., taking into consideration the finding of the jury, the personal injury in question was not within the warranty.

Per GALT, J., that it was a matter of doubt on the evidence whether the depression in the skull arose from natural causes or from the fall, and it must be assumed from the answers of the jury to the questions put to them that they adopted the former view, and so there was no breach of the warranty.

Per BURTON, PATTERSON, JJ.A., and GALT, J., that the answer to the 14th question was not a breach of the warranty, as the question was an ambiguous one, and might fairly have been interpreted by the assured as an inquiry as to the first occasion of his having to seek the services of a physician.

Per GALT, J., and BLAKE, V. C., that if the Court below thought that the jury had answered the questions contrary to the evidence they should have ordered a new trial, but could not enter a verdict for the defendants. The Court being equally divided, the appeal was dismissed, but without costs, one member of the Court, BLAKE, V.C., who was against the plaintiff on the merits, being of opinion there should have been a new trial.

THIS was an appeal from the judgment of the Court of Queen's Bench, making absolute a rule *nisi* to set aside a verdict for the plaintiff, and enter a verdict for the defendants, 41 U. C. R. 497. The facts are stated there, and in the judgments on this appeal.

The appeal was argued on the 21st January, 1878 (a).

Bethune, Q.C., (*Rose*, with him,) for the appellant. It is quite clear from question nine in the application that the "personal injury" in the eighth question, which the company required to be disclosed, was an injury so serious as to have an effect upon the general health. But his general health is shewn to have been unaffected by the fall in question, and it is not even pretended that this injury had any connection with his death. Question eight must be considered as having reference to injuries not sufficiently important to be mentioned in question seven, but still important enough to be remembered. It does not appear that the insured attached any importance to this fall, or that it was present to his mind when he signed the application. He had no desire to conceal it, and mentioned it to Dr. Wright, but it is clear he attached no consequence to it. It surely cannot be held that the insured was bound to disclose every personal injury which he had received during his lifetime, even though it had escaped from his memory. A cut upon the finger is a personal injury; and if such be the law, it would, if undisclosed, have the effect of avoiding the policy. It appears very uncertain from the evidence

(a) *Present*.—BURTON and PATTERSON, JJ.A., GALT, J., and BLAKE, V.C.

whether the depression was caused by the fall. The medical testimony shews that he might have been born without this piece of bone. The statements however in the application are not warranties, but merely representations. At any rate, even if the first portion of the memorandum at the foot thereof is a warranty, the latter part, from the words "and if there be in any of the answers," &c., is only a representation. But even if the statements are held to be warranties the insured only warranted that the answers were "fair and true." It was a question for the jury whether these answers were "fair and true," and their finding should not be disturbed. The fourteenth question was ambiguous, and was fairly open to the construction put upon it by the insured, that it referred to the first occasion when he was attended by a physician. He referred to *Southern Life Assurance Co. v. Wilkinson*, 53 Geo. 549; *Insurance Co. v. Wilkinson*, 13 Wall. 222; *World Mutual Life Insurance Co. v. Shurtz*, 5 Bigelow 104; *Fitch v. American Popular Insurance Co.*, 5 Bigelow 316; *Anderson v. Fitzgerald*, 4 H. L. Cas. 484; *Foot v. Aetna Co.*, 5 Bigelow, 324.

McMichael, Q.C., for the respondents. The application and policy in this case are similar to the application and policy in *Anderson v. Fitzgerald*, 4 H. L. Cas. 484, in which it was held that the representations contained in the application were warranties, although they were not so intended by the insured. The statements in the application being warranties, the policy is avoided if they are untrue, no matter how immaterial they may be, or whether they arose from ignorance or forgetfulness. The evidence shews beyond all doubt that the injury in question was caused by the fall, which resulted in loss of a piece of the skull. This was not a temporary but a permanent injury, which it was incumbent on the insured to mention as a personal injury. The answer was intentionally misleading, as it is plain that it was present to his mind, as he mentioned it to Dr. Wright just after his examination, but in such a manner as to deceive him as to its importance. Under

these circumstances the answer cannot be considered either fair or true. It is not clear but that the old injury was contributory to the death. The medical men would not have trephined so near the depression if they had not thought that the injury was connected therewith. Had this injury been known to the medical adviser of the company he would not have passed the life without making a special report to the company. At all events we are entitled to have the verdict entered for us on the answer of the jury to the seventh question, inasmuch as they found that the insured had been attended by other medical men during the thirty years for trifling ailments, and his representation to the contrary was therefore untrue. He referred to the judgment of the Court below, and the cases mentioned therein.

December 6th, 1878 (a). BURTON, J. A.—This action was brought by one of the children of the assured, Charles Moore, on a policy of assurance effected by him with the defendants on his own life for the benefit of his wife and children.

The case of *Campbell v. The National Ins. Co.*, 34 U. C. R. 40, in the Queen's Bench, decides that under the Act to secure to wives and children the benefit of assurances on the lives of their husbands or parents, the wife or child, and not the personal representative, is the proper party to sue, and that case has been since followed in all the Courts.

The declaration sets forth that by a policy, dated the 27th March, 1875—after reciting that in consideration of the representations and declarations made in the application, and of the annual premium of \$1,173.50, the defendants insured his life for the term thereof in the sum of \$25,000, and did agree to pay the same to Esther Ware Moore, and all the children of the assured, it was by the policy declared that the same was issued and accepted upon the following express conditions and agreements, that is to say :—

(a) *Present.*—BURTON and PATTERSON, JJ. A., GALT, J., and BLAKE, V. C.

“1st. That the answers, statements, representations, and declarations contained in or endorsed upon the application for this insurance—which application is hereby referred to and made a part of this contract—are warranted by the assured to be true in all respects; and that if this policy has been obtained by or through any fraud, misrepresentation, or concealment, then this policy shall be absolutely null and void; and further, that no answer, statement, representation, or declaration made to any agent, solicitor, or any other person whatever, and not contained in said application, shall be taken or considered as having been made to, or brought to the notice or knowledge of this company; and this company shall be held and considered as having no notice or knowledge of such answer, statement, representation, or declaration; and the said application, a copy of which is hereto annexed, shall be taken and held to be and to contain the only answers, statements, representations, or declarations made to this company on behalf of this insurance.”

The declaration then refers to some other conditions not material to this enquiry, and proceeds to state that the application is in these words, setting it forth *verbatim*. I have, however, only referred to those portions which have a bearing upon this appeal.

“7. Have you ever had any of the following diseases? Answer (yes or no) opposite each:—Apoplexy? No. Diphtheria? No. Fistula? No. Syphilis? No. Paralysis? No. Bronchitis? No. Piles? No. Rheumatism? No. Insanity? No. Spitting of Blood? No. Affection of Liver? No. Gout? No. Epilepsy? No. Habitual Cough? No. Affection of Spleen? No. Neuralgia? No. Habitual Headache? No. Asthma? No. Fever and Ague? No. Dropsy? No. Fits? No. Scarlet Fever? No. Disease of the Heart? No. Scrofula? No. Consumption? No. Dyspepsia? No. Palpitation? No. Small-pox? No. Pneumonia? No. Colic? No. Aneurism? No. Yellow Fever? No. Pleurisy? No. Rupture? No. Disease of the Urinary organs? No. Cancer or any Tumour? No.

"If you have a rupture state whether you habitually wear a truss? State the number of attacks, character and duration of all the diseases which you have had?"

"8. Have you had any other illness, local disease, or personal injury? And if so, of what nature? How long since? And what effect on general health? No."

"14. How long since you were attended by a physician? About 30 years ago. For what disease? Lake fever. Give name and residence of such physician? Dr. Sampson, of Kingston, who is now dead. Name and residence of medical attendant? Dr. Barrick, of Toronto, who attends my family. Has known me seven years. Name and residence of an intimate friend? Mr. Dunbar, of Toronto. Has known me seven years."

The declaration then contains the usual averments of the fulfilment of all matters requisite to be performed in order to entitle the plaintiff to maintain the action, and negatives the happening of any thing to prevent her maintaining the same. Although not further noticed in the declaration, at the foot of the application was a memorandum, signed by the applicant, as follows:—

"It is hereby declared and warranted that the above are fair and true answers to the foregoing questions; and that no statements respecting the physical condition, habits, personal or family history of the person whose life is proposed for insurance, other than those above made, have been made to any agent, solicitor, examiner, or other person, in behalf of the company; and it is acknowledged and agreed by the undersigned that this application shall form a part of the contract of insurance, and that if there be, in any of the answers herein made, any untrue or evasive statements, or any misrepresentation or concealment of facts, then any policy granted upon this application shall be null and void; and all payments made thereon shall be forfeited to the company. And it is further declared by the undersigned, that the party making this application has an 'insurable interest' in the life above proposed for insurance, to the full amount above applied for."

The defendants pleaded: 1st. A denial of the policy, and the following pleas, upon which issue was joined.

And for a second plea the defendants say, that the answer given in the negative by the said Charles Moore, as in the declaration mentioned, to the question, "Have you had any other illness, local disease, or personal injury? and if so, what nature? how long since? and what effect on general health? was untrue. That the said Charles Moore had some twelve years before the time when he signed the said application and answered the said question in the negative, received a blow on the head which produced a fracture or depression of the skull, and which was followed by exfoliation of the bone of the skull, and which also caused to some degree inflammation of the brain. That the said blow was a personal injury within the meaning of the said question, and that the answer, "No," given to the said question was untrue, and was a breach of the warranty contained in the said application, and that by reason of such untrue answer and breach of warranty, the said policy was forfeited.

3. And for a third plea to the said declaration, the defendants say that the said Charles Moore had, before the time when he made the said application, been afflicted with dyspepsia, and that the answer, "No," given by the said Charles Moore to the question, "Have you ever had any of the following diseases (among others), dyspepsia, was untrue, and a breach of the warranty contained in the said application, and was untrue to the knowledge of the said Charles Moore.

4. And for a fourth plea, the defendants say that the answer given to the question, "How long since you were attended by a physician? namely, about thirty years ago, was untrue to the knowledge of the said Charles Moore. That the said Charles Moore had, previous to the making of the said application, and at a much shorter period than thirty years, received a severe blow on the head, the effects of which remained until his death, and that whilst he was suffering under such injury, he consulted and availed him-

self of the skill of a medical man, one Dr. Lizars, and that he concealed the said fact. That he had so consulted the said medical man and gave no reference to the said medical man, and that the answer given to the said question was untrue, and was a breach of the warranty contained in the said application.

The cause was tried before the Chief Justice of this Court, and the policy put in and admitted, and the plaintiff then closed his case. It was objected that as the policy contained a warranty, that was not sufficient, but it was necessary to give some general evidence of good health, which was overruled, and evidence was then given shewing that the answer to the 8th enquiry, Have you had any other illness, local disease, or personal injury? if to be construed in its literal terms, was untrue, and also that the answer to the 14th enquiry was incorrect.

The learned Judge instructed the jury that in this case the company had put certain specific questions to the applicant, which they required him to answer correctly, at his peril. They had stipulated that his answers should form part of the contract which he was about to enter into. They said to him in effect, "You must answer these questions correctly; if from forgetfulness or inadvertence you answer a question incorrectly, we hold the policy void. That they had a right to make that stipulation, but it was in his judgment a stipulation that should be construed with great strictness. When they put a very general question, under a stipulation of that kind, it was only reasonable and just to put on that general question a fair construction; for instance, take the question they put with reference to any other illness, local disease, or personal injury, he thought that question must be read in a fair and common-sense way. If the applicant had had a headache the very day before, and had not stated it in his application, it could not be said that this policy was good for nothing, simply because he had not stated that; and yet a doctor would tell them that a headache was an illness, and that it came, strictly speaking, within that term.

Subject to that limitation—that the questions were to be read in a fair and common sense way, having regard to all the circumstances surrounding the man and all the information that the company might reasonably expect to receive,—he told them that in his view the company had required the applicant to give correct answers to the questions they put.

The learned Judge then, with appropriate explanations and directions, submitted the following questions to the jury :—

1. Had Mr. Moore any personal injury which must have been present to his own mind as something coming fairly within the term “personal injury,” and which he did not communicate to the defendants ?

2. Had he had any serious or severe personal injury which, through forgetfulness or inadvertence, he did not communicate to the company ?

3. Had he any personal injury which he might have been fairly expected to communicate for the information of the defendants ?

That he remarked was almost another form of one of the preceding questions, but raised a point slightly different.

4. Had he any personal injury which had any effect on his general health ?

5. Had he been afflicted with dyspepsia ?

6. Had Mr. Moore been attended by a physician for any of the diseases detailed in the application ?

7. Had he been attended by any physician but Dr. Sampson for any disease whatever, or only for some trifling ailment not amounting to a disease ?

And then, in order to cover the whole ground as far as possible, the learned Judge added these two questions, referring to the stipulation at the end of the application, “It is hereby declared that the above are fair and true answers to the foregoing questions.”

8. Did he give fair and true answers to the questions, “Have you had any other illness, local disease, or personal injury ? And if so, of what nature ? How long since ? And what effect on general health ?”

9. Did he give fair and true answers to the questions, "How long since you were attended by a physician? For what disease? Give name and residence of such physician?"

The jury answered all the questions from 1 to 6, inclusive, in the negative.

To No. 7: "No, only for trifling ailments."

And to the two last questions: "Yes."

The learned Judge thereupon entered a verdict for the plaintiff.

A rule *nisi* was obtained to set aside the verdict, and to enter a nonsuit or a verdict for the defendants, pursuant to the Law Reform Act, or for a new trial, the verdict being, as alleged, contrary to law and evidence, and also because the answer of the jury to the 7th question, that he had been attended by other physicians, though only for trifling ailments, was virtually a finding for the defendants; and for misdirection in the learned Judge, in not directing the jury that on the evidence of the untruth of the answers to the 8th and 14th questions they should find for the defendants.

This rule on argument was made absolute, and a verdict directed to be entered for the defendants on the issues found on the 2nd and 4th pleas, and this appeal is against that decision.

Mr. Bethune, upon the argument, endeavoured to draw a distinction between the first portion of the memorandum at the foot of the application, which he admitted was a warranty, and the concluding portion, commencing, "and if there be in any of the answers," &c., which he contended was a mere representation. But it is evident that the whole must be read together, and the matter is placed beyond all dispute by the language of the policy, which, referring to the application, provides and makes it a condition of the assurance that the answers, statements, representations, and declarations contained in, or endorsed upon, that application, which was made part of the contract, are warranted to be true in all respects, and if there has been any non-compliance with that condition the policy is unquestionably

void. That was evidently the view of the contract taken by the learned Judge at the trial, although he was of opinion that from the very general nature and character of the enquiries there must be some limitation to them, and for the purpose of saving the parties the expense of another trial, and of affording an opportunity of a more mature consideration of the question than could be given to it at Nisi Prius, as I understand it, the learned Judge proposed the questions submitted to the jury.

It is unnecessary, therefore, to refer to the well known distinction between that which amounts to what is called a warranty, and that which is merely a representation inducing a party to enter into a contract. That representation, if made *bonâ fide*, unless it be material, would not vitiate the contract whether false or not; but if the company choose to say, "The basis of our contract is, that you shall answer truly the questions we submit to you in the application, and if you do not answer them truly the policy shall be void and you shall forfeit all sums paid on account of premiums," the Courts are bound to give effect to that stipulation.

Where a warranty is intelligibly and clearly given by an insured, no matter how immaterial the fact warranted may be, he will be held to his contract. Still it will be strictly construed and not extended beyond its precise terms.

These documents are prepared by the company, and if there is any ambiguity in them, the construction most favourable to the applicants must in accordance with a well established rule of law, be placed upon them, whilst it is at the same time incumbent upon the Courts to protect companies of this kind against fraud or fraudulent misstatements. Applying this rule to the 14th enquiry, I incline to think that the learned Judge submitted that question to the jury on terms scarcely sufficiently favourable to the plaintiff. The enquiry is not whether he had, at certain times, been attended by a medical man, for any disease, but the question is framed in ambiguous terms, terms it may be which would be readily understood by a

lawyer, or a person having an acquaintance with assurance, but which might easily be misunderstood by persons not conversant with such matters.

The actual language of the enquiry is, "How long since you were attended by a physician? For what diseases? Give name and residence of such physician. Name and residence of your medical attendant." To quote the language of Lord St. Leonards, in *Anderson v. Fitzgerald*, 4 H. L. Cas. 484, 510, "A policy (and the same reasoning applies in the cases of applications,) ought to be so framed that he who runs can read. It ought to be framed with such deliberate care, that no form of expression, by which on the one hand the party assured can be caught, or by which on the other the company can be cheated, shall be found upon the face of it. Nothing ought to be wanting in it, the absence of which may lead to such results. When you consider that such contracts as this are often entered into with men in humble conditions of life, who can but ill understand them, it is clear that they ought not to be framed in a manner to perplex the judgments of the first Judges in the land, and to lead to such serious differences of opinion among them."

It is not difficult for persons accustomed to construe such documents, to understand that this enquiry had reference to the most recent serious illness of the applicant requiring medical treatment, but I can at the same time easily imagine that a person not having that experience might assume that the enquiry had reference to the first period in his recollection where he required the services of a medical man, coupled as it is with the enquiry in the same connection as to the name of his last or usual medical attendant.

If the question proposed to the applicant had been, whether he had been attended by a medical man for any of the diseases detailed in the application, or whether for those or any other diseases or personal injury he had been attended by a medical man, and how long since he had last required such professional assistance, the answer

would have been manifestly evasive, but it is not so put. If the applicant had simply, in reply to the enquiry, given the name of Dr. Barrick, and stated the complaint for which he last attended him, and the date of such attendance, the requirement would, in my opinion, have been complied with.

Looking at the construction placed upon the enquiry by the company, it was manifest that the applicant had misunderstood it, and it was incumbent, I think, upon the company, if not satisfied with the answer, to have called his attention to it, and required further explanations.

The jury have, however, found that during the period covered by the enquiry, he had not been attended by a medical man for any of the diseases referred to, or for any disease other than a trifling ailment not amounting to disease.

The amendment does not appear to have been actually made, and I incline to think the plea as amended would have been bad on demurrer. The way in which the applicant understood the question is manifest from his answer, viz., when were you first attended by a physician? The reasons therefore alleged to shew the falsity of the answer, are in that view immaterial. They do not shew that his answer was untrue, but that he did not understand the question in the way in which the company now propose it should be read; but it may be questionable whether it would be open to the plaintiff to urge that contention upon this issue, unless perhaps on the ground that the substance of the issue is that the answer "30 years ago" was false, and therefore a breach of warranty, the subsequent allegation in the plea being only a statement of the facts or evidence upon which the defendants rely to prove its falsity.

I have not considered the question, but I concur in thinking that the verdict on the issue should not be interfered with, and that the addition of the words "only for trifling ailments" does not entitle the defendants to have the verdict entered in their favour. Nor do I think there is any evidence that the assured was aware that he was suffering from dyspepsia. Upon both these issues, therefore, I think the verdict of the jury was correct.

The remaining question is one of great difficulty and of serious importance, not only to the family of the deceased, but to assurers and assurance companies generally.

The defendants claim that if the deceased ever met with any personal injury that will bar a recovery, because the answers in the application are warranties that he never did. Carrying that reasoning out to its logical conclusion, the policy never attached, because it is incredible that a man at his age had never suffered from any other illness than those enumerated, or from any local disease.

My brother Patterson, in the judgment he will presently deliver, is of opinion that—the fact being established that the assured did meet some years ago with an accident causing a fracture to the skull, although it may have escaped the recollection of the assured, and did not in point of fact affect his general health—judgment must necessarily be given in favour of the company, such a fracture being a personal injury within the meaning of the policy.

In other words I understand his judgment to go to this extent, that although as to such trifling ailments or injuries as a slight cold or cut finger, as to which the maxim "*de minimis*" might be held to apply, any accident resulting in a personal injury, although attended with no serious consequences, and although it had long since been forgotten by the applicant, must be disclosed at his peril.

It may be that that is the proper construction to place upon this contract, but I think the company could scarcely have supposed that that was the nature of the security they were issuing, still less would the assured have been willing to accept it. Looking at the number and character of the minute enquiries specifically made of the applicant, embracing a great number of diseases, followed by the general enquiry—have you had any other illness, local disease or personal injury? and if so, of what nature, how long since, and what effect on general health? it would almost be absurd to suppose that the company intended, or that any one dealing with them could have supposed

that they intended, that he should specify each of them categorically in addition to those before specially referred to, and warrant the answers—in other words, require him to state every illness and every disease or personal injury which, for forty or fifty years, he might have laboured under, and to hold the answers to be warranties in the strictest sense of that term. It would be in substance to make it optional with the company whether to pay or not, for it would indeed be a marvellous thing if some ailment or accident were not omitted.

In the interest of the company as well as of the assured, we should struggle against such a construction which would require the applicant to comply with an impossibility, would be trifling with his rights, and would be a judicial declaration that the holders of such policies have in fact perfectly illusory and worthless securities.

It may be said that the applicant might have avoided the difficulty by qualifying his answers and stating that he had no "such injury to his knowledge," but it could scarcely be expected these replies should be prepared with the strictness and accuracy of a special demurrer, and unless we are bound to place the strict construction upon the contract which the defendants contend for, the applicant's answer, read in the light of the findings of the jury, amounts to nothing more.

The jury have said in effect, "The applicant had not "any serious or severe personal injury;" he had no personal injury which affected his general health; he had not this injury present to his mind when making the application. And the jury have further found that the injury was not of that character that an ordinary and reasonable man would suppose to come within the terms of the application, and which, therefore, it would be his duty to communicate, and that he gave fair and true answers to all the enquiries. It may, I assume, be conceded, that if in point of fact it was present to his mind it was his duty to communicate it, leaving the company to form their own opinion of whether it was of a nature to affect the risk; but as I understand the findings of the jury, they negative its being

present to his mind, having been in fact so slight in its nature as to have made but little impression upon him. I do not understand it to be seriously contended that there was not evidence to support the findings if the questions were proper ones to be submitted to the jury, or that there is any sufficient reason shewn for interfering with them as being against the weight of evidence.

Undue stress has, I think, been placed upon a conversation with the medical examiner after his examination of the applicant and after he had signed the answers contained in the *examination report*, and which has, I think, been confounded with the *application*, and relied on as shewing that the accident was present to his mind at that time. But it by no means follows that because when he was examined by the medical man he happened to recollect the circumstance, it must have been also present to his mind when he signed the application, which for aught that appears may have been signed some days previously. It is quite clear that if the injury had been mentioned in precisely the same terms in the application as it was to the medical examiner, it would have met the requirements of that document and been treated in precisely the same way by him, and although by the terms of the policy the notice to the medical man is no notice to the company, it appears difficult to acquit him of blame in not seeing that an omission of that nature was at once supplied on its being made known to him, conversant as he was with the requirements of the company. He was made aware previously to that conversation that the applicant had met with some injury. That at least is the construction that most persons would put upon the answer to question 9, that he had received "no severe injury."

That the applicant, in mentioning the accident to his head, accompanied by the further statement that he was not injured by it, was acting in good faith is manifest, I think, from the evidence of his brother, who says that the former accident, which occurred some fourteen or fifteen years previously, never appeared to affect him at all, and

he never heard him complain of it although he was in business with him for twenty-one years. Neither is there any evidence to shew that he was ever under medical treatment for it, or for a single day absent from his business. He may, therefore, well have been justified in referring to it as he did, and the jury were perfectly warranted in the conclusion that it was not a serious injury, or one which was or should have been present to his mind.

There is therefore not only no evidence that the applicant had any reason to believe it serious, but there is evidence of medical men that it had no effect upon his general health, and that a blow like that from which he died, which was proved to be about two inches from it, "would not," to use Dr. Aikins's own language, "matter much," although near the spot, if it did not touch it.

This is, however, only material as shewing that the injury was of such a character as might naturally fail to present itself to the mind of the deceased when making the application, if that be material.

There are no doubt many persons, especially those of quiet and sedentary habits, who would not fail to recall such an accident on making such an application, but a person accustomed to the hunting field, and meeting with a similar accident once, or oftener perhaps, in each season, might regard it as a matter of no moment. It is difficult therefore to bring one-self to the belief that it ever could have been the intention of the parties to this contract that the word "personal injury" was to receive the construction now contended for. I have failed to find any authority expressly bearing upon it.

In the Supreme Court of the United States a discussion arose in *Insurance Co. v. Wilkinson*, 13 Wallace 222, as to the construction to be placed on the words "serious personal injury," it being contended that if the applicant had at any time received a serious personal injury, although he had entirely recovered from its effects the omission to disclose it was a breach of the warranty.

The Court below refused to place that construction upon it, saying, at p. 568, 3 Bigelow: "The

language of the question is, to have a reasonable construction 'in view of the purposes for which the question was asked. It must have reference to such an accidental injury as probably would, or might possibly, have influenced the subsequent health or longevity of the assured." And then, after intimating that it could not have referred to such trifling injuries, to a simple burn or to a sprain, proceeds: "The idea is, that such a construction is to be put by the Courts upon the language as an ordinary person of common understanding would put upon it when addressed to him for answer. The strict construction or hypercriticism of the language which would make the word 'any' an indefinite term, so as to include all injuries, even the most trifling, would bring a just reproach upon the Courts, the law, the defendant itself, and its business."

On appeal to the Supreme Court of the United States the decision, *Insurance Co. v. Wilkinson*, 13 Wallace 222, was affirmed; and it was there urged that if the injury was considered serious *at the time*, it was one which must be mentioned in the answer to the interrogatory, and that whether any further enquiry was expedient on the subject of its permanent influence, was for the insurer to determine before making the insurance. But the Court said there were grave and obvious difficulties in that construction: "The accidents resulting in personal injuries, which at the moment are considered by the parties serious, are so very numerous that it would be almost impossible for a person engaged in active life to recall them at the age of 40 or 50 years, and if the failure to mention *all* such injuries must invalidate the policy, very few would be sustained where thorough enquiry is made into the history of the party whose life is the subject of insurance. There is, besides, the question of what is to be considered a serious injury at the time. If the party gets over the injury completely, without leaving any ill consequences, in a few days, it is clear that the serious aspect of the case was not the true one. Is it necessary to state the injury and explain the mistake to meet the requirements of the policy?"

“On the other hand, when the question arises on a trial the jury and not the insurer must decide whether the injury was serious or not. In deciding this are they to reject the evidence of the ultimate effect of the injury on the party's health, longevity, strength, and other similar considerations. That would be to leave out of view the essential purpose of the enquiry, and the very matters which would throw most light on the nature of the injury with reference to its influence on the insurable character of the life proposed.

“Looking then to the purpose for which the information is sought and the difficulty of answering whether an injury was serious in any other manner than by reference to its permanent or temporary influence on the health, strength, or longevity of the party,” the Court held that the Judge did not err in the criterion by which he directed the jury to arrive at a decision.

I think it unreasonable to hold that the very general words in this policy are to be taken without qualification, and upon the jury finding that the injury was of such a character that it might fairly have escaped the recollection of the assured, and had in fact been overlooked by him, the Judge was right in holding that it was not such a personal injury as came within the meaning of the policy. I am aware that this may seem to be opposed to many of the decisions on the construction of written documents, but the reasoning in those cases will probably be found to be inapplicable to a case like the present on the peculiar and unusual wording of this policy of insurance, and the application on which it was founded; and the extraordinary consequences which must follow the giving effect to the contention of the defendants, viz., that it will leave it optional with them to pay or not the large number of policies they have issued, ought not to be without some weight in coming to a decision. I am compelled therefore to differ from my brother Patterson in his construction of this contract, whilst agreeing with him that if his view be correct there can be no possible object in compelling the parties

to go down to another trial. All parties, Judge, Jury, and Counsel, assumed that there had been a personal injury, the sole question being whether that term could admit of any qualification. If it cannot, the learned Judge was wrong in submitting the question he did to the jury, and he should have told them that on the facts proved it was their duty to find in favour of the defendants.

The only ground for submitting the case to another jury would be, that some other qualification which was not presented to them was open, but no such point has been suggested.

I think it must be a very unusual thing at the present day to issue policies with such very stringent conditions as are contained in the policy sued upon, in which every answer is to be taken as a warranty, and every misstatement held to avoid the policy. Lord St. Leonards, in the case I have referred to, says, "I think it very important to impress upon companies that they ought not to issue policies in this shape, and I think they would do well to place the word "wilful" before the words "false statement,"—a suggestion which has, I believe, been very generally acted upon, most companies now confining the declaration of the applicant to matters within his knowledge and belief, and avoiding the policy only if any untrue statement has been intentionally made.

I think the utmost protection should be afforded to the companies against fraud and intentionally false or evasive statements; but again, to quote from Lord St. Leonards, *Anderson v. Fitzgerald*, 4 H. L. Cas. 484, 513, "Every Court of Justice should endeavour to give such a construction to a policy of this nature as will afford a fair security to the person with whom the policy is made, that upon the ordinary construction of language, he is safe in the policy, which he has accepted. I am quite sure that if policies of this nature are to be entered into, and such doubts are to be raised as have been raised in this case, * * life insurance will become very distasteful to the people,

and no prudent man will effect a policy of insurance with any company without having an attorney at his elbow to tell him what the true construction of the document is."

Entertaining the view I do that the words must receive the limitation placed upon them in the questions submitted to the jury, the learned Judge had no alternative, if that view be correct, but to enter a verdict for the plaintiff, and the rule to set aside that verdict should have been discharged with costs.

The appeal, therefore, in my judgment, should be allowed.

PATTERSON, J. A.—The plaintiff, who is one of the children of Charles Moore, declares upon a policy effected by her father insuring his life for \$25,000, to be paid to his wife and all his children; by which policy it was declared that the policy was issued and accepted upon the express condition and agreement (amongst others) that the answers, statements, representations, and declarations contained in or endorsed upon the application for that insurance were warranted by the assured to be true in all respects, and that if the policy had been obtained by or through any fraud, misrepresentation, or concealment, it should be absolutely null and void.

The application is set out. The seventh question contained in it is, "Have you ever had any of the following diseases? Enumerating many of the ills that the flesh is heir to, including dyspepsia and fever and ague. As to all of which the answer was "No." The eighth asks, "Have you had any other illness, local disease, or personal injury? And if so, of what nature? How long since? And what effect on general health?" This question was answered "No."

The ninth. "Is there now existing any disorder, or any infirmity, or weakness?" was also answered "No."

The fourteenth embraced several questions to which separate answers were given. "How long since you were attended by a physician? About thirty years ago. For what disease? Lake fever. Give name and residence of

such physician? Dr. Sampson, of Kingston, who is now dead. Name and residence of medical attendant? Dr. Barrick, of Toronto, who attends my family. Has known me seven years. Name and residence of an intimate friend? Mr. Dunbar, of Toronto. Has known me seven years.

The defendants, by their second plea, set up that the answer to the eighth question was untrue, because Moore had some twelve years before the application received a blow on the head which produced a fracture or depression of the skull, and which was followed by exfoliation of the bone of the skull, and which also caused to some degree inflammation of the brain; and they aver that the said blow was a personal injury within the meaning of the question.

And the fourth plea alleges that the answer to the fourteenth question was untrue, because Moore had, at a later period than thirty years before the application, been attended by Dr. Lizars for an injury from a severe blow on the head.

The third plea alleged that Moore had suffered from dyspepsia. The jury found against this plea, and nothing further turned upon it. Our attention is therefore confined to the second and fourth.

The breach of warranty alleged in the second relates entirely to the alleged injury caused by a blow on the head.

The lake fever, for which Dr. Sampson attended the applicant, and gonorrhea, for which Dr. Lizars is shewn to have treated him, though they might, not unreasonably, have been insisted on as an illness and a local disease which ought to have been mentioned in answer to the eighth question, are only spoken of in relation to the fourth plea; and even that plea, as it stands on the record, does not bring them directly in question.

The fact that a blow had been received, and that an injury to the skull had resulted from it, was clearly shewn. If it had been doubtful, the learned Judge who tried the cause would not have omitted to ask the jury to pronounce upon it. If it could have escaped his attention, we may

be sure that the able and experienced counsel who represented the defendants would not have failed to bring the omission to his notice; as a finding that no such occurrence took place would, if fairly supported by the evidence, have been decisive.

It is quite apparent, however, that there was no possible doubt about it. After Charles Moore's death it was found by an examination of the head that part of the bone was gone, and its absence caused a depression. Dr. Nicol says, Moore spoke of it as from a fall from a horse. Edward Moore, the brother, speaks of the old injury. He says: "I felt his head after the last accident in the store. The hurt was about two inches from the old injury, on the same side of the head. I saw the old injury then; you could not help but see it. I had been aware of it before. It had been cut and healed up. I felt the injury to see if the skull had been broken. * * There was a very slight depression on his skull. You could not see it unless you were close to him, and knew it was there. I knew it was there, but I never noticed that there was a depression until the day he came to me after being hurt the last time. I knew that he had had his head hurt previously."

I am not sure that Edward Moore means to say from what accident the old injury had resulted, though he says his brother had told him of some accident. He says the first injury was being thrown from a cutter one Sunday, fourteen or fifteen years ago; and afterwards he believes Charles was thrown from his horse in the hunt. I suppose, however, he does speak of the cutter accident as that which injured Charles's head, because Mr. Ferguson gives a similar account of it.

Mr. Ferguson's evidence is: "I was asking him how the accident occurred. I felt the head and saw it. There had been a cut apparently, and I think it would be a cross cut from the appearance of it. It was then discoloured. The seams, as I call them, were a little red and depressed. It appeared to me like any wound that had healed up. He was in good health then. * * He said that he was driving

and the horse ran away, and its turning caused him to fall forward out of the cutter. There is an idea in my mind that it was icy, frosty, when it happened. I think he spoke of it when he came in. He came to see me on business. It was not more than some months after the accident. I think it was not more than some weeks after. That is a number of years ago. I think it was tolerably soon after the injury, but I would not profess to say the number of weeks. There appeared to be two rather rough cuts across one another, one deeper and heavier than the other. I did not notice any depression in the skull."

The evidence of Dr. Nicol, and that of Dr. Aikins, who made the *post mortem* examination, and who speak of previous knowledge of the injury to the head, goes in the same direction.

Reading all this evidence, it is impossible to escape the conviction, which was evidently that of those who were concerned at the trial, either as judge, jury, counsel, or witnesses, that the first part of the third plea was substantially proved: that upon the leading facts alleged, viz., the blow on the head and the consequent injury to the skull, no dispute was possible, and no question existed which required even a formal submission to the jury; and that the contest was confined to the closing allegation of the plea, namely, that the blow was a personal injury within the meaning of the eighth question. It is accordingly to this inquiry that we find all the questions directed which were left to the jury upon the issue on the third plea.

I may here notice that while the assured is shewn to have been fully aware of the injury to his head, it does not appear to have affected his general health, or to have caused him any inconvenience.

When he signed the application he mentioned to Dr. Wright, the defendants' examining physician, as Dr. Wright states in his evidence, the circumstance that he had had a fall on his head, but said it had not injured him.

Dr. Wright made no examination of the head, as he doubtless would have done if he had been told the truth that the fall had left its mark.

The mention of the fall to the doctor is chiefly material as shewing that the accident was present to the mind of the applicant.

The first, second, third, fourth, and eighth questions submitted to the jury related to this branch of the case. The *first* was: "Had Mr. Moore any personal injury which must have been present to his own mind as something coming fairly within the term 'personal injury,' and which he did not communicate to the defendants?" The learned Judge explained to the jury that it appeared to him it might possibly be held that any personal injury must be one that would be fairly present to the mind of a person making such an application, as something that an ordinary man would understand as a personal injury *that he ought to communicate to the company*; telling the jury that if they thought that, they would of course answer the question, "Yes"; and adding, "In other words, if you think that this injury to his head, whatever its extent and origin, did fairly come within the term 'personal injury,' and was present to Mr. Moore's mind, then the answer should be 'Yes.' If you think it was so slight, and made so little impression upon himself and his own mind that *he could not accept it as fairly coming within* the term, then you will answer 'No.'"

The jury answered "No."

They also answered "No" to the *second* question, which was, "Had he any serious or severe personal injury, which through forgetfulness or inadvertence he did not communicate to the company?"

The *third* question was, "Had he any personal injury which he might have been fairly expected to communicate for the information of the defendants?"

This was answered "No," as was also the *fourth*, viz., "Had he any personal injury which had any effect on his general health?"

The *eighth* was the general question, "Did he give fair and true answers to the questions, 'Have you had any other illness, local disease, or personal injury, &c.'"; and the

answer, "Yes," was obviously a mere repetition of the answers to the first four questions.

The jury thus seem to have found, *first*, that an ordinary man would not understand the injury in question as a personal injury that he ought to communicate to the company; and that the assured could not accept it as fairly coming within the term, "personal injury," as used in the question asked him :

Secondly. Either that the injury was not serious or severe, or that the failure to communicate it was not due to forgetfulness or inadvertence:

Thirdly. He could not fairly have been expected to communicate it:

Fourthly. It had no effect on his general health.

Passing over the inquiry whether some of these questions were not more proper for the Court than the jury, there is in my opinion no warrant for introducing any of the qualifications suggested by them into the clear and simple contract which the assured made with the defendants. He undertook to answer truly the questions they asked. They asked, had he had any personal injury? and he answered No, which was untrue.

If he had introduced into his answer the qualifications or exceptions now sought to be imported into the question, the defendants would have had the opportunity of making such further inquiries as seemed advisable. They were to judge what kind of injury they deemed material to the risk, and they simply asked what injuries had been sustained.

The principle settled by the decision of the House of Lords in *Anderson v. Fitzgerald*, 4 H. L. C. 484, is applicable to this policy, which resembles in its terms the policy in question in that case.

At the trial of that case the jury had been told that although the statements of the assured, as to certain matters, were false statements made to the company "in and about effecting the insurance," the verdict must be for the plaintiff unless those statements were material as well

as false. Lord Cranworth, after referring to the earlier part of the charge, said, at p. 502: "Up to this point I entirely concur with the learned Judge. He puts the case very distinctly and clearly. He then goes on thus: 'What could answer this inquiry, or be said with any propriety of language to come within such terms, but a misstatement used by the assured to induce the company to contract, and how could it have done so if it had been utterly immaterial'? Now there, my lords, I differ from the learned Judge. The company stipulates this, that the assured shall contract with the company that he warrants certain things to be correct; and further stipulates that if he should make to the company any untrue statement in and about effecting the policy, such untrue statement shall avoid the policy; and then the company says that it will not contract with him till he shall answer certain questions, which are made the basis of the contract. * * The stipulation is, that if he shall not answer these questions accurately the policy shall be void. That is the interpretation of the contract, which, taking together the policy and particulars required to be subscribed, appears to me irresistible. The requirement is extremely reasonable. * * The reason for making such a stipulation is obvious, and is explained by this very case. Whether certain statements are or are not material, where parties are entering into a contract of life insurance, is a matter upon which there must be a divided opinion. Nothing therefore can be more reasonable than that the parties entering into that contract should determine for themselves what they think to be material; and, if they choose to do so, and to stipulate that unless the assured shall answer a certain question accurately, the policy or contract which they are entering into shall be void, it is perfectly open to them to do so, and his false answer will then avoid the policy."

This short extract indicates the principle which has, I believe, been uniformly acknowledged, during the quarter of a century which has passed since that judgment was pronounced, as the true guide in the construction of con-

tracts of this class. The cases of *Jeffries v. Life Ins. Co.*, 22 Wall. 47, and *Ætna Life Ins. Co. v. France*, 1 Otto. 510, decided by the Supreme Court of the United States in 1874 and 1876, may be referred to as recent examples of its application among our neighbours.

I do not understand either the principle itself, or its application to the policy before us, to be now questioned. The contention is, not that the assured was excused from truly answering if he had had any personal injury, but it is as to the meaning of the term as used in the application. What is a personal injury?

This I take to be a question for the Court, and not for the jury.

The jury finding the facts, such as the nature, character: and consequence of whatever accident may be shewn to have happened, the question whether a personal injury within the meaning of the contract has been sustained, is a question of construction, and is for the Court. Or, to put the same thing in a converse form, the Judge may tell the jury with reference to the evidence in the particular case, when a general verdict is to be rendered, what facts must be found by them to sustain a verdict for the defendant company.

Thus, in *Hutchinson v. Bowker*, 5 M. & W. 535, the defendants had offered the plaintiffs to sell *good* barley; and the plaintiffs accepted the offer, adding the words, "expecting you will give us *fine* barley and of good weight." In an action for not delivering the barley, it was proved and found by the jury that the terms *good* and *fine* were terms well known in the trade; and the jury found that there was a distinction between *good* barley and *fine* barley. It was held that, the jury having found the meaning of the terms in a mercantile sense, it was for the Court to construe the contract, and to say whether or not the offer had been accepted.

In *Neilson v. Harford*, 8 M. & W. 823, the question was, what was the meaning of the words in the specification of a patent, "The shape of a receptacle is imma-

terial to the effect, and may be adapted to the local circumstances." It was contended that the jury was the proper tribunal to decide the meaning of those words, but the Court held differently, Parke, B., saying: "The construction of all written instruments is for the Court, whose duty it is to construe all such instruments as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been found by the jury," and he proceeded to shew the mischief that would result from a contrary rule. Juries, he says, would give different meanings to the same contract; but when the construction lies with the Court, uniformity is attained.

In *Kirkland v. Nisbett*, 3 Macq. H. L. Cas. 766, the appeal was from the refusal to allow the question, "What would the employer be entitled to expect?" to be put to a witness skilled in the Madras trade, who had been called to prove the mercantile usage applicable to a written contract concerning the purchase of sugar at Madras. The refusal was sustained. The Lord Chancellor, Lord Campbell, said: "You cannot ask a witness what is the meaning of a written document, as is clearly sought to be done here. The letter is read over to the witness, or he is desired to read it; and then he is asked what the employer would be entitled to expect. Of course he would be entitled to expect what the letter imports; and the question as to the contract between the parties depends upon the meaning of the words used. But the object of this question was clearly to lead the witness to put a construction upon the contract to govern the Court and jury."

I have not found anything in the cases to which we have been referred to support the defendants' contention as to the construction of this contract.

I find no authority for qualifying the words used. Even in the class of American cases which grapple with applications in which the word "injury" is qualified by such words as "serious" or "severe," I do not observe that the express qualification has materially simplified the task of deciding what injuries are intended.

It is urged that we must not read the words of the eighth question in their broad literal meaning, because "illness, local disease, and personal injury," will include such trifling ailments as an influenza, a toothache, or a black eye; but that we must find some such limitations of their significance, as the jury have been asked in this case to consider.

An obvious answer to this is that if the terms necessarily cover trifling ailments, then the contract is that trifling ailments shall be stated, because the question is not what we may think it reasonable for the company to ask, but what they have asked.

I do not think, however, that any practical difficulty of this kind arises.

We must, in construing the question, as in construing any document, have regard to the use of the language as employed in the common affairs of life, avoiding on the one hand a fanciful or strained construction, and on the other a reading which may be etymologically defensible, but which is not of common use.

The case of *Stanley v. Western Ins. Co.*, L. R. 3 Ex. 71, affords a recent instance of the application of this rule. The policy in question in that case contained a clause, "Neither will the company be responsible for loss or damage by explosion, except for such loss or damage as shall arise from explosion by gas." The Court held this to be confined to ordinary illuminating coal gas, and not to entitle the insured to recover for a loss occasioned by the explosion of gas of another character. Kelly, C. B., said, at p. 73: "The words of the policy are to be construed, not according to their strictly philosophical or scientific meaning, but in their ordinary and popular sense."

It may not be easy to define the limits between mere hurts or ailments and injuries or diseases. Each case must be dealt with by itself.

An injury which makes a man a chronic invalid will be recognised by every one as a personal injury; but shall we exclude from that term the loss of a leg or an arm, because the general health is as good as before the accident?

We have in the case before us evidence of what was ascertained *post mortem*, and also evidence shewing knowledge by the assured, and his friends and medical acquaintances, of the existence and general character of the injury.

I have already alluded to some details of this evidence, but not to all of it. Amongst other statements there is one made by Dr. Aikins in answer to a question by a jurymen. He had described the operation of trephining, which had been performed in close proximity to the site of the old injury, and the jurymen appears to have desired to know why that spot had been selected for the operation. The doctor's reply was: "I was given to understand that he had struck his head against a bolt, and struck where he had a former injury, and so we operated close to the old injury; but we were afraid that if we took out the tissue it might be dangerous." And in answer to a question by counsel he said: "We did not find any bruise. We seem to have hit the place where the matter was. It was easy to tell that the injury was on the right side of his head, because the palsy was on the left."

Dr. Aikins had explained that the instrument called the trephine, the purpose of which was to remove a small piece of the skull, had been placed so that the edge of it just came over the edge of the deficiency or old injury; and that they did not operate immediately over the old injury because they were satisfied (as afterwards proved to be the case) that the tissues of the skin or scalp would be glued very firmly to the membrane that lines the skull, or the dura mater, and therefore it would not have been wise to place the instrument there. The *matter* which he speaks of was found when they removed the piece by trephining. I refer to this evidence merely to show that the doctors were directed to the particular spot, not by any mark which the blow that proved fatal left, but because they were told it was where the former injury had been. Told, by whom? The individual is not mentioned, but the knowledge of the old injury, and the fact that, correctly or incorrectly, it was connected, in the mind of

some one who knew of it, with the result of the later blow, are shewn.

It is not shown that the old injury had any share in causing the death of the assured. Nor was that a subject of inquiry under any issue on the record.

The immediate cause of death was the later blow, and there is nothing proved which shews that it was not of sufficient violence to have produced all the effects discovered by the surgeons, even if no previous injury had been sustained.

But the nature of the fatal accident suggests, and the other evidence supports the suggestion, that a less violent blow, and one which would have fallen innocently on a sound skull, might have had a fatal effect if it had lighted upon the spot where it would have found, what may be described in the words of the ninth question of the application, as "an existing infirmity or weakness."

The general health of the assured may have been unaffected; it is possible he may not have been aware that the membranes or tissues afforded a less efficient protection to the brain than the skull had done while unbroken; he may not have known that the depression was caused by the absence of a portion of the skull; or if he did he may not have thought of it as a source of danger, or of increased liability to injury. It is not likely that he considered the matter from the point of view which a life assurance company would adopt; and even his habit of venturesome riding, and his frequent falls from his horse, which formed the subject of conversation which witnesses speak of, may not have had in his mind the same significance in connection with the old injury as the company might, not improbably, have attributed to them. Still the injury had been sustained; the effects were there and were a standing source of peril; or might have been so considered by the company.

I entirely agree with the judgment of the Court below that the plaintiff cannot recover upon this policy.

But it has been urged that the proper course was to order a new trial, and that the entry of a verdict for the

defendants was an assumption by the Court of the functions which in this case should have been exercised by the jury.

The verdict was entered by the learned Judge at the trial in pursuance of the provisions of the C. L. P. Act. which now form s. 264 of ch. 50 of the Rev. Stat. of Ontario,

Sec. 263 enacts that "upon any trial by a jury, where the Court or the presiding Judge otherwise directs, it shall not be lawful for such jury to give a general verdict; and it shall be the duty of such jury to give a special verdict if the Court or presiding Judge so directs."

And, by sec. 264, the "Judge may (except in certain cases) instead of directing the jury to give either a general or special verdict, direct the jury to answer any questions of fact stated to them by the Judge for the purpose, and in such case the jury shall answer such questions and shall not give any verdict; and on the finding of the jury upon the questions which they answer, the Judge shall enter the verdict."

A special verdict must contain a statement of all the facts necessary to enable the Court to give judgment upon the case.

The verdict entered by a Judge after asking the jury to answer specific questions is in form a general verdict. The facts specifically found by the jury are not entered on the record as in the case of a special verdict; and the facts specifically found are not necessarily all the facts material to the disposal of the case, but only such disputed facts as have to be settled by the finding of the jury. Take, for example, an action on a deed on which the pleas are *non est factum* and special pleas, such as fraud, duress, or release. The deed is produced at the trial, and its execution admitted, or proved by the attesting witness and not denied. No Judge would think it necessary under sec. 264 to go through the form of directing the jury to answer, Did the defendant make the deed? He would confine his questions to the other issues.

Or, suppose an action in which the general issue only is

pleaded, such as one against a municipality for negligently allowing a bridge to be out of repair, by reason of which the plaintiff fell from the bridge and was injured.

If it were proved, and not denied otherwise than by the plea, that the plaintiff did in fact suffer from a fall from the bridge owing to a broken plank or rotten handrail, it would not be thought necessary formally to ask the jury if he did so fall. The questions put would be upon the facts touching the charge of negligence, or countercharge of contributory negligence.

A special verdict would in either of these cases be incomplete unless all the facts were stated, but those not actually in dispute would be stated as a matter of form. The questions really submitted to the jury would be the same under section 263 as section 264.

In *Tidd's Practice*, at p. 928, it is said: "It is also a general rule that in a special verdict (as nothing is to be intended), the jury must find facts, and not merely the evidence of facts; and if in this or any other particular the verdict be defective, so that the Courts are not able to give judgment thereon, they will amend it, if possible, by the notes of counsel, or even by an affidavit of what was proved upon the trial; or otherwise they will supply the defect by awarding a *venire de novo*."

The fact not expressly found in the case before us, viz., the occurrence of the accident and the resulting injury, is just of the class which, under the practice thus stated by Mr. Tidd, would even at common law have been supplied by amendment, if a special verdict had to be drawn up.

The Court, in reviewing a verdict entered by the Judge under section 264, must of course proceed upon only those facts which were before the Judge at the trial; but to hold that only those facts can be considered which are formally set down in the answers of the jury, would be to apply to the more liberal practice intended to be established by section 264, a more rigid rule than that which governed the special verdict under the stricter regime of the common law.

What took place was tantamount to the Judge saying to

the jury: "The assured is shewn to have had a fall by which his head was injured, as the witnesses have described it, and he did not mention that injury in his application; the plaintiff cannot recover if that injury was a personal injury within the meaning of the eighth question; therefore, in order to enable me to say whether it was such a personal injury, I ask you to answer the questions which I shall put to you."

No suggestion was made at the trial that the questions put to the jury did not cover everything upon which a finding was necessary. The Judge was not requested to ask the jury the one question, a negative answer to which would have settled the controversy, if it had been justified by the evidence, viz., Was the assured in fact injured as alleged? and he was not asked, because no one perceived room for disputing the account given. If the case were sent back upon this issue, it could only be, in my view of the law, to ask that one question; a proceeding neither necessary nor proper, if I am correct in my opinion that the fact is already regularly before the Court.

I do not think the power of the Court to review and reverse a verdict entered by a Judge, as in this case, depends upon the provision of 37 Vic. ch. 7, sec. 33 O., which now forms sec. 283 of chapter 50 of the R. S. O., that "Every verdict shall be considered by the Court in all motions affecting the same, as if leave had been reserved at the trial to move in any manner respecting the verdict, and in like manner as if the assent of parties had been expressly given for that purpose."

The power existed long before that provision was enacted. What the precise effect of the very wide terms of the section may be, is not a question which arises at present. But if express authority were wanted for the Court treating the evidence as establishing the facts which it is clear all parties at the trial took it to establish, or drawing inferences from it which are so obvious that no one thought of even formally submitting them to the jury, the section must at least go the length of conferring that authority.

If it stops short of that it is not easy to see what force it has.

For these reasons I think it was proper to enter a verdict for the defendants in place of ordering a new trial.

In my opinion the appeal should be dismissed, because the defendants are entitled to the verdict upon their second plea. I shall therefore allude only in as brief a manner as possible to the questions discussed respecting the issue upon the fourth plea.

Three questions were put to the jury by the learned Judge upon this issue, and I understand they, as well as the questions which I have already discussed, were put for the purpose of covering every point that was suggested by counsel, or occurred to the Judge himself, as likely to be made the subject of argument.

Question 6 was, "Had Mr. Moore been attended by a physician for any of the diseases detailed in the application?" to which the jury, in accordance with the evidence answered, "No."

Question 7. "Had he been attended by any physician but Dr. Sampson for any disease whatever, or only for some trifling ailment not amounting to a disease?" to which the answer, "No, only for some trifling ailment," indicates the opinion of the jury that the malady for which he was treated by Dr. Lizars, and which is stated by one of the medical witnesses to be local in its character, to give rise to constitutional disturbances which are not permanent, and would not be felt for any length of time, and sometimes to affect the general health, is not a disease, but only a trifling ailment.

And in answer to the ninth question, the jury find that the assured did give fair and true answers to the questions "How long since you were attended by a physician? For what disease? Give name and residence of such physician." The fact proved being that, many years after Dr. Sampson had attended him for lake fever, he had been treated by Dr. Lizars.

It has been argued that the fourteenth question in the

application, "How long since you were attended by a physician?" is ambiguous, and may well have been understood as asking when he was first attended by a physician.

The answer given, read in connection with the other answers, indicates that the assured did so understand it: and, so understanding it, his answer is not shewn to have been untrue.

This position is not taken by the pleadings, and does not seem to have been put forward at the trial.

On the other hand, the plea alleges only that he *consulted and availed himself of the skill* of Dr. Lizars while suffering from *a severe blow on the head*; which allegation is by no means so clearly proved as to warrant interference with the verdict, even if the plea had followed the language of the question, which it does not.

I observe that leave was given to amend the plea, the Court however to determine, in the fullest possible way, whether the Judge should under the circumstances have made the amendment.

The plea comes before us without amendment.

I should hesitate to allow the amendment to be made now; because by so doing we might enable the defendants to evade the terms of taking the opinion of the Court of Queen's Bench upon the propriety of allowing it.

I observe that the learned Chief Justice, in giving the judgment of the Queen's Bench, uses language not properly applicable to the plea in its present form, but which would be applicable if the amendment had been made; but it is proper also to bear in mind that if the amendment were made in fact the plaintiff need not join issue, but might demur on the ground that the question was properly treated as referring to the first occasion on which the attendance of a physician was required.

On the whole, I should not have disturbed a verdict for the plaintiff upon this issue.

If the plea had been amended, and issue joined upon it, I should not be inclined to disturb a verdict for the defendants upon it.

For the purpose of this appeal, I do not think it necessary to consider this matter more closely.

I think the appeal should be dismissed.

GALT, J.—This was an action tried before Moss, C. J., and a jury. In place of requiring the jury to render a general verdict, the learned Chief Justice directed them to answer certain questions, and upon the answer given he entered a verdict for the plaintiff. This course was adopted in accordance with the provisions of section 32 of 37 Vic. ch. 7, O., which enacts that “upon a trial by jury (except in certain cases), the Judge, instead of directing the jury to give either a general or a special verdict, may direct the jury to answer any questions of fact stated to them by the Judge for the purpose; and in such case the jury shall answer such questions, and shall not give any verdict, and on the finding of the jury upon the questions which they answer, the Judge shall enter the verdict, and the verdict so entered, unless moved against, shall stand and be effectual as if the same had been the verdict of the jury.”

By section 33 of the same Act: “Every verdict shall be considered by the Court, in all motions affecting the same, as if leave had been reserved at the trial to move in any manner respecting the verdict, and in like manner as if the assent of parties had been expressly given for that purpose.” In this case the jury answered all the questions in favour of the plaintiff, and the learned Chief Justice entered a verdict for her. Upon the motion made to set aside this verdict, and to shew cause why a nonsuit or a verdict for the defendants should not be entered, pursuant to the Law Reform Act, the Court of Queen’s Bench made the rule absolute to enter a verdict for the defendants.

This forms the first branch of this appeal, and in considering it I am of opinion we have nothing to do with the findings of the jury, or rather with the correctness of the answers given by them to the questions submitted, the simple question being whether in a case like the present, where a verdict has been entered by the learned Judge in

strict accordance with the answers of the jury, the Court has power, under the 33rd section above cited, to set aside that verdict and enter another directly against the answers of the jury.

In *Merchants' Bank v. Bostwick*, 28 C. P. 465, Hagarty, C. J., in commenting on this section says: "These words are very wide, wider I dare say than they were intended to be. I am not, however, prepared to turn a verdict for the defendant found by a jury into a verdict for the plaintiff, without the defendant's assent. The application of these words in their fullest sense would be rather startling in many cases. A defendant in libel, slander, false imprisonment, &c., who had got a verdict from a jury, would be surprised at an exactly opposite verdict being entered by the Court without his assent. But I am of opinion that the plaintiffs, if they deem it of sufficient importance, ought to be allowed a new trial on this branch of the case."

I quite agree with the above observations of the Chief Justice, and have only to add, that if in a case like the present the Court can set aside the verdict for the plaintiff, and enter a verdict for the defendants, the trial by jury, in cases where the learned Judge, acting under the provisions of the 32nd section, submits questions to them in place of directing them to give a general verdict, becomes a nullity. I do not know that such was the intention of the Legislature. I am of opinion that the 33rd section empowers the Court to deal with the verdict rendered, and to set it aside, or to reduce or diminish the amount if the evidence warrants it, but not to turn a verdict for the plaintiff into a verdict for defendant. I am borne out in this opinion by the course pursued by the Legislature in regard to cases tried by a Judge without a jury, where they have declared that whenever the verdict or finding of the Judge is moved against, it shall not be obligatory on the Court before which such motion is made to grant a new trial, when the objections taken are objections against the sufficiency of the evidence, and the erroneous view taken thereof by the Judge, or on a mistaken view of

the law of the case, but the Court may pronounce the verdict which in their judgment the Judge who tried the case ought to have pronounced, and may amend the *postea* and enter the verdict accordingly: 33 Vic. ch. 7, sec. 6, O.. The conclusion at which I have arrived is, that in cases tried by a jury, when they have given no verdict but merely answered questions submitted to them, the Court has the power to review the verdict entered by the learned Judge, if they think his verdict is not in accordance with the answers given; but they have not the power to review the answers as contrary to the evidence, and to set them aside; the only way in which this can be done is by directing a new trial. I am, therefore, of opinion that this appeal must be allowed, and the verdict directed to be entered for the defendants set aside.

The second branch of the case is of much greater importance, and if that is decided against the plaintiff it would scarcely be worth her while to bring the case again before a jury. This branch involves two questions,—First, What is the contract between the parties? and second, Does the evidence establish a breach of warranty on the part of the deceased of such a nature as to render the policy void?

The declaration (so far as is necessary for the consideration of the first question), after stating the fact of effecting the policy, proceeds: “And by the said policy it was declared that the said policy was issued and accepted upon the following express conditions and agreements, that is to say: 1st. That the answers, statements, representations and declarations contained in or endorsed upon the application for this insurance, which application is hereby referred to and made a part of this contract, are warranted by the assured to be true in all respects, and that if this policy has been obtained by or through any fraud, misrepresentation, or concealment, then this policy shall be absolutely null and void, &c. It then enumerates certain conditions to which it is unnecessary to refer, and sets out the application at length, together with the answers given by the assured to the different questions therein contained,

and avers a compliance with conditions, &c. The defendants plead, 1st. *Non est factum*; 2nd, 3rd, and 4th. Breaches of warranty in the answers given to certain of the questions. I shall refer to them hereafter.

As the policy refers to the questions and answers, and stipulates that the assured warrants the answers to be true, I admit that there was a warranty, but surely it was a question for the jury whether they were true or not. This was the view taken by the learned Chief Justice at the trial, and he submitted certain questions to them, the answers to which have been set aside by the Court of Queen's Bench.

The 8th question put to the assured was, "Have you had any other illness, local disease, or personal injury; and, if so, of what nature? How long since? and what effect on general health?" Answer, "No." The issue raised by the evidence on this answer was submitted to the jury by the Chief Justice in the following manner: "Bearing the evidence in mind, I ask you to reply to the following questions: 1. Had Mr. Moore any personal injury, which must have been present to his own mind as something coming fairly within the term 'personal injury,' and which he did not communicate to the defendant? You will perceive from the terms of this question the idea present to my mind in framing it. It appeared to me that it might possibly be held that any 'personal injury' must be one that would be fairly present to the mind of a person making such an application, as something that an ordinary man would understand as a personal injury that he ought to communicate to the company; and if you think so, you will of course answer the question, 'Yes.' In other words, if you think that this injury to his head, whatever its extent and origin, did fairly come within the term 'personal injury,' and was present to Mr. Moore's mind, then the answer should be 'Yes.' If you think it was so slight, and made so little impression upon himself and his own mind that he could not accept it as coming fairly within the term, then you will answer 'No.'" The jury answered No.

"2nd. Had he had any serious or severe personal injury which, through forgetfulness or inadvertence, he did not communicate to the company? I have already pointed out to you that in my construction of these questions in this application, the applicant must at his own peril answer the questions correctly, and that forgetfulness or inadvertence will not excuse him. If he makes a slip the company can, if found consistent with fair dealing or necessary for the protection of its own interests, set it up; but I want to get your answer to this question." Answer, No.

"3rd. Had he any personal injury which he might have been fairly expected to communicate for the information of the defendant? This is almost another form of one of the preceding questions, but raises a point slightly different." Answer. No.

"4th. Had he any personal injury which had any effect on his general health? It is contended by the learned counsel for the plaintiff that that is the fair meaning of the question put in the application with reference to any other personal injury, illness or local disease. The words must have some limitation, and it may be that the proper limitation is that they should be confined to injuries that affect the general health. In considering this question you will bear in mind what all the witnesses said as to the state of health Mr. Moore had after the accident, and consider the medical evidence as to the effect which it might have. Although the medical men would be no doubt the first themselves to admit that it is not comparable with evidence of the actual state of health which he did enjoy. That is the last question in relation to the personal injury." Answer. No.

It appears to me to be impossible to suggest any improvement on the above manner of submitting the different questions to the jury. Their attention was specifically called to each branch of the evidence bearing on the question of personal injury, and they were carefully reminded of the obligation which rested on the assured to give truthful answers. The jury have answered each ques-

tion in the negative, and it appears to me to be contrary to every principle of the administration of justice by trial by jury to turn those answers into the affirmative. If the jury have decided contrary to the evidence there should be a new trial, but not a verdict for the defendants. In my opinion, however, the answers of the jury are fully sustained by the evidence, which may be briefly stated as follows. The assured was an exceptionally healthy, vigorous man.

Dr. Nicol says: "I think he was a very healthy man, a vigorous, strong man."

Dr. Aikins says: "I knew Mr. Moore very well. I was in the habit of seeing him weekly, and sometimes several times a week. Up to the time of his last illness he appeared to be a very vigorous, dashing man, living largely in the open air, and he looked like a man who had a large amount of physical strength."

Dr. Barrick says: "You would find very few men as healthy as Mr. Moore."

It appears that some eleven or twelve years ago he met with an accident, being thrown from his horse, or out of a sleigh. It did not appear from the evidence that this fall had any effect on his health, nor does it appear that he ever complained of its effects.

Dr. Valentine says: "I was present on one occasion when Dr. Lizars was prescribing for an injury to Mr. Moore, who was bruised in different parts of the body and on the head, as he stated from a fall from a horse; that was what Mr. Moore stated. I think that was in 1865, it was certainly not later than 1866. The injury to the head was apparently merely a contusion, no injury to the bone was discoverable. Dr. Lizars attended him for about a week or ten days." At page 22 he says: "And the injury to the head, the contusion; there was nothing at all in that case, he was simply directed to call and keep himself under observation in case anything did occur, it was simply a contusion of the skin; he was kept under observation, and no cerebral symptoms arose, this was in 1865, I think, it was not earlier than 1864 or later than 1866.

Edward Moore says, (after referring to the accident which caused his death): "The former accident did not prevent his attending to business. I saw him then. He was not undressed. It did not appear to affect him at all."

Mr. Ferguson gives evidence to the same effect.

After the accident happened from the effects of which Mr. Moore died, it was deemed advisable by his medical attendants to perform the operation of trephining, and in doing so they discovered that a piece of the bone of the skull was gone near the spot where the trephine was used.

Dr. Aikins, who performed the operation, says (p. 13): "There was a depression there. Mr. Moore, for years past, had kept his hair very short, and as far as I remember the depression could be seen, but there was no difficulty whatever in feeling it. The point of the little finger could be easily buried in the depression, perhaps the index finger, just the point of it. This was the first time I had attended Mr. Moore, but I was in the habit of seeing him often. If I had been aware of the depression before that evening, I had forgotten it. There was a piece of bone absent there; there was a part of the skull gone, no matter what had happened to it, whether it *never* was there or was the result of disease or injury the piece was gone, and we planted the trephine so that the edge of the instrument just came over the edge of the deficiency. There was a dense tissue, as dense as ligament, binding the under part of the scalp close to the membrane which lines the inside of the skull; that was the condition where the piece was absent. Whatever the cause of that was it was not a recent one. It would be of at least a year's standing. There may have been a natural opening in his head, although that is a most unnatural place for it; but I have seen bones with natural openings in them. I would not expect to find an opening there, although I have seen children born with an opening in the bone where no opening ought to be; but I would come to the conclusion from looking at his head that he had lost a piece of bone either from fracture or disease; of course some diseases would kill bone.

I have seen men with no fracture who have lost a part of the skull."

Dr. Barrick (p. 18) says: "I was present when the trephining operation was performed. I do not know that I and the other doctors discussed the question of the injury to the bone of the skull. I had some doubt as to that being the result of an external injury, because people cannot always interpret their accidents and the results of them. If a man came to me with a depression in his skull, twelve years after a certain fall from his horse, I could not say whether that depression was the result of that fall, or of some primary disease of the bone that would cause the same. A disease of the bone in that place would not necessarily be the result of injury. I had not heard from him of any constitutional ailment. As far as I had reason to believe, I do not think there was any constitutional condition in Mr. Moore likely to cause an injury to the skull such as we found there. I cannot say positively that the condition there arose from an injury, but the strong probability is, that it did."

Before proceeding with this branch of the case, I would refer to the above evidence read in conjunction with that of Dr. Valentine and Edward Moore, already quoted, to shew that it is impossible to convert the verdict given by the jury in favour of the plaintiff on the second plea into a verdict for the defendants. That plea is: "That the said Charles Moore had, some twelve years before the time when he signed the said application and answered the said question in the negative, received a blow on the head which produced a fracture or depression of the skull, and which was followed by exfoliation of the bone of the skull, and also caused to some degree inflammation of the brain." The evidence to which I have referred (Dr. Valentine's), shews that on that occasion "the injury to the head was apparently merely a contusion; no injury to the bone was discoverable." And both Dr. Aikins and Dr. Barrick state that although they were of opinion the absence of a part of the skull was probably caused by an injury, still it

may have arisen from natural causes. This was therefore emphatically a question for the jury, and they have found that he had no personal injury which he did not communicate to the defendants. They must therefore have believed the absence of the bone arose from natural causes, and not from an injury. This was a matter of fact for their consideration and not for the Court.

But to return to the question whether the answers to the questions were supported by the evidence. It is very singular that there is little or no evidence to prove that the absence of the bone, relied on by the second plea, was occasioned by an accident. It is plain from Dr. Valentine's testimony that on the occasion to which the injury is attributed there was no discoverable injury to the bone.

Mr. Ferguson, to whose evidence I have already referred, and who, with the exception of Dr. Valentine and Mr. E. Moore, is the only person who ever examined the head of the deceased during his lifetime says (p. 24), I was the solicitor of Charles Moore for a number of years. He shewed me his head one time when he was talking to me in my private office. I was asking him how the accident occurred. I felt the head and saw it. There had been a cut apparently, and I think it would be a cross cut from the appearance of it, &c. I did not notice any depression in the skull.

Mr. E. Moore (p. 23) says: "The former accident (referring to the one now under consideration) did not prevent his attending to business. I saw him then. He was not undressed. It did not appear to affect him at all. I never heard him complain of the first injury."

The only evidence given to connect the absence of the bone with an external injury is that of Dr. Nicol, and I entertain very grave doubt whether it can be considered as evidence at all. The only portion of his testimony which, as respects this question, was admissible is: "I *think* that one day I had some conversation with him in reference to this injury to the head. It was on one of these two occasions, 1869 or 1870. I do not remember what he said about it except that it was a fall from a horse, or from his

horse falling on a furrow. I had not seen the injury to his head at that time. I have *some idea* that I put my finger in the place where he told me, *but I could not say positively.*" In answer to the question, "Was any remark made as to the nature of the injury?" "Yes; I think there was something said about a piece of bone being lost, but whether he volunteered it, or whether it was in an answer to a question from me, I cannot say." To the question, "Do you say that there was loss of the bone when you examined it in 1869? I could not say positively, but I *think* there was. When I put my finger in, as I *think* I did, I found the depression. He spoke of that as a fall from a horse.

Q. Then, he was under the impression that that kind of injury caused it? Yes; *but if the bone* perished and exfoliated, it would be equally from this injury as if he had had the bone fractured, and the surgeon removed the bone at the time.

Q. At the time you examined it were you under the impression that a surgeon had removed the bone? Yes; I did not think that anybody else had done it. I supposed at that time that he had had the skull fractured, and that some surgeon or other had removed the piece of bone.

The foregoing is rather remarkable evidence. The witness begins by stating, *not* that he had, but that he *thought* that he had some conversation with the deceased in 1869 or 1870 in reference to an injury to his head. He then states that he had some idea that he put his finger in the place, *but he could not say positively*; and then, in answer to the last question, gives evidence as if he had actually made an examination. I can only say that it would be a matter deeply to be regretted if the rights of parties were to be affected by such testimony as this, and that in my opinion no weight whatever should be attached to it.

It may, however, be said that the assured himself admitted he had had a fall on his head, but it must be borne in mind that at the time he made that statement he added that he was not injured by it.

Dr. Wright (p. 22) says: "After that paper was filled up,

excepting the last question, the one that I have to answer, he mentioned an accident. After he had signed the paper he passed it back again, over from his chair, and was about leaving when he spoke of a fall that he had had upon his head. He said he was not injured by it. The question was repeated to him and he again asserted he had had a fall upon his head and it had not injured him. I did not put my hand over the place. I did not consider it necessary after what he said. He appeared to be a man of good health. I had seen him frequently.

It is manifest from the foregoing, that if the family of the deceased are deprived of their provision from the carelessness of Dr. Wright in not prosecuting the inquiry, and including a statement of the occurrence of the accident in the answers of the assured, no blame is attributable to the latter. He told the medical examiner of the accident, who believing that no injury had been sustained, and seeing the man in good health, did not deem it necessary to refer to it. The evidence, as I have already shewn, left it a matter of doubt whether the absence of the bone proceeded from natural causes or from external injury; and although it may be said that the evidence was stronger in favour of the latter than of the former view, yet it was a question for the jury, and I gather from their answers that they adopted the former; and, if so, their answers are sustained by the evidence, and this appeal, so far as this branch of the case is concerned, should be allowed.

It was, however, urged on behalf of the defendants, that the answer to the eighth question was a warranty that he had had no other illness than those enumerated in the seventh question, local disease or personal injury, and that if the accident in question had occasioned the injury to the skull which was discovered after his death, he was bound to disclose it, otherwise the warranty was broken, and the plaintiff could not recover, whether the assured was conscious of the existence of such injury or not. This assumes that the defect in the skull was caused by an injury, but, as I have shewn, there was a conflict of evidence on this

point, and the jury have found it was not. This is the effect of their answers, and consequently there was no breach of warranty.

It is to be remarked that in the judgment now appealed from, the learned Chief Justice says: "But we do not, however, rest our decision of this case upon the answer to the eighth question."

It is unnecessary to consider the issue raised by the third plea, as there was not sufficient evidence to support it; and the Court of Queen's Bench having decided it in favour of the plaintiff, it is not in question on this appeal.

The answer to the fourteenth question, which is the subject of the fourth plea, remains to be considered. That plea is, "And for a fourth plea the defendants say, that the answer given to the question. How long since you were attended by a physician? nearly about thirty years ago, was untrue, to the knowledge of the said Charles Moore. That the said Charles Moore had previous to the making of the said application, and at a much shorter period than thirty years, *received a severe blow on the head, the effects of which remained until his death, and that while he was suffering under such injury he consulted and availed himself of the skill of a medical man, one Dr. Lizars, and that he concealed the said fact, that he had so consulted the said medical man, and gave no reference to the said medical man, and that the answer given to the said question was untrue, and was a breach of the warranty contained in said application.*" At the trial this plea was allowed to be amended, and would then be as follows: that the said Charles Moore had previous to the making of said application, and at a much shorter period than thirty years, consulted and availed himself of the skill of other medical men, to-wit, Dr. Lizars, Dr. Nichol, Dr. Barrick, Dr. Valentine, and Dr. Russell, and that he concealed the said fact, that he had been attended by and consulted the said medical men, and gave no reference to the said medical men; and that the answer given to the said question was untrue, and a breach of the warranty contained in said application.

Before considering the questions submitted by the learned Chief Justice to the jury, and the answers given by them bearing on this plea, let us look at the evidence. Dr. Lizars is dead. Dr. Valentine says: "I myself never attended professionally, or prescribed for the late Charles Moore." He adds that Dr. Lizars did. Dr. Nicol was attending his wife and children, and says: "I attended him once in August, 1869, it was for a slight derangement of the liver and bowels. I supposed it was from the heat of the weather; of course it was not for anything serious then. I never knew him again until "I was called to attend his wife and children. I was called in in September, 1870; that so far as I remember was very hot weather, and he had some derangement of the liver and some fever, and afterwards some diarrhoea, that is to the best of my recollection. They were both very slight attacks. The occasion in 1869 and 1870 are the only ones in which I attended him personally. The assured gave the name of Dr. Barrick as the name and residence of his medical attendant. The question is, Give name and residence of medical attendant. Dr. Barrick, of Toronto, who attends my family, has known me some years. There is no evidence that Dr. Russell ever attended him at all. It must be borne in mind that Dr. Lizars was dead at the time of the application, and consequently there was no use in making any reference to him. The assured did furnish the name of his medical attendant, and from that gentleman's evidence it is manifest that beyond a little occasional advice as to taking exercise, and a trifling operation for an ingrowing nail, the deceased neither required nor received attendance from him.

It appears to me, however, that the whole question raised by the fourth plea has arisen from a misconception of the question, and that the answer as given is strictly true. The question is this: No. 14. How long since you were attended by a physician? For what disease? Give name and residence of such physician. Name and residence of medical attendant. Name and residence of an intimate friend.

The construction put upon this question by the defendants is, that the assured is bound to state when he was *last* attended by a medical man. This is the view they take of the expression, "How long *since* you were attended by a physician," but it is susceptible of another meaning, and may be read as "first," and there is much to be said in favour of this view. It is evident that either the word "first" or "last" must be imported into the sentence, that is to say, it must be either "How long since you were *last* attended by a physician?" or "How long since you were *first* attended by a physician?" The reason why I am of opinion that the latter view has much to support it is, that immediately following the question is the direction, "Give name and residence of such physician." Had the question stopped here, I think the contention of the defendants would have been unanswerable. The whole interrogatory would then have been, "How long since you were attended by a physician? Give name and residence of such physician." But that is not the case. The interrogatory proceeds, in a distinct sentence, "Name and residence of medical attendant." Surely it was not the intention of the framer of the question to require the applicant to repeat the name of the medical attendant already given. The phrase "medical attendant" necessarily imports that there has been "an attendance," and consequently the assured, in answer to the question, "How long since you were attended by a physician?" must necessarily name his present medical adviser, if he interpreted the sentence to mean, "How long since you were *last* attended by a physician?" It must also be borne in mind that the previous questions had required the applicant to give an account of his health from his birth, and a history of his family. It then proceeds to the fourteenth question. Was it then unreasonable or unnatural that the assured should interpret the question, "How long since you were attended by a physician?" to have regard to his past life, followed as it immediately is by a question regarding his present state, by requiring him to name his present medical attendant.

I am not, however, in deciding this case driven to assert that the latter view is absolutely the true one. It is sufficient to support the case of the plaintiff to shew that the question is fairly susceptible of that interpretation. The question was framed by the defendants, and if they have misinterpreted the answer that is no fault of the assured. He answered the question truly, as he understood it, and is not responsible for the consequence.

In *Fitton v. Accidental Death Ins. Co.*, 17 C. B. N. S. 122, Willes, J., says: "It is extremely important, with reference to insurance, that there should be a tendency rather to hold for the assured than for the company where any ambiguity arises upon the face of the policy."

My brother Burton in his judgment has gone so fully into this branch of the case that it is unnecessary for me to do more than to say I agree with the conclusion at which he has arrived. My judgment therefore is, 1st. That the Court of Queen's Bench was wrong in setting aside the verdict for the plaintiff and entering a verdict for the defendants; and, 2nd. That the rule in the Court below should have been discharged. Consequently this appeal should be allowed and the rule in the Court below discharged.

BLAKE, V. C.—The deceased, to the eighth enquiry, "Have you had any other illness, local disease, or personal injury? And, if so, of what nature? How long since? And what effect on general health?" answered, "No." His death resulted apparently from an injury to the head received a short time before he died. It is alleged, in one of the pleas, that the deceased untruly answered the eighth query above set out, in that he "had some twelve years before the time when he signed the said application, and answered the said question in the negative, received a blow on the head which produced a fracture or depression of the skull, and which was followed by exfoliation of the bone of the skull, and which also caused to some degree inflammation of the brain."

The following seems the material evidence on this question :—

Dr. Nicol says : “ When I was first called in to see him, in his last illness, he was apparently suffering from a species of low fever, with some head affection ; then, I think on the night following the day he was attacked, he was attacked with paralysis of the left side, and then after that he became semi-comatose.”

Q. Did you find on examination any evidence of personal injury ?

A. Yes, just on the parietal bone, on the right side of the head ; there was a depression that I could just put my little finger into.

Q. What examination was made to enable you to judge of the injury to the skull ?

A. Trephining ; there was a deficiency in the bone, perhaps the space of my little finger, perhaps a little more. It was not a very recent injury. * * The depression I mentioned was easily discoverable to any person who had reason to suspect its presence, or who searched the head carefully ; its depth was slight, not more than a tenth or an eighth of an inch ; you would hardly have noticed it.

* * I think that one day I had some conversation with him in reference to this injury to the head ; it was on one of these two occasions, 1869 or 1870. I do not remember what he said about it, except that it was from a fall from a horse, or from his horse falling on a furrow. I had not seen the injury to his head at that time. I have some idea that I put my finger in the place where he told me, but I could not say positively. * * I think there was something said about a piece of bone being lost, but whether he volunteered it, or whether it was in answer to a question from me I cannot say. * * There was a loss of bone.

* * I cannot say positively, but I think there was ; when I put my finger in, as I think I did, I found the depression. He spoke of that as a fall from a horse.

Q. Then he was under the impression that that kind of injury caused it ?

A. Yes; but if the bone perished and exfoliated, it would be equally from this injury, as if he had the bone fractured and the surgeon removed the bone at the time. * * I supposed at that time that he had the skull fractured, and that some surgeon or another had removed the piece of bone. * * If an examining physician had passed his fingers at all carefully over Mr. Moore's head, he would have detected the depression in the skull; if he merely passed his hand over the head, he would not have discovered it.

Dr. Aikens, in answer to the question, "What was the condition of the skull before you commenced the operation"? says, "There was a depression there. Mr. C. Moore for years past had kept his hair very short, and so far as I remember the depression could be seen, but there was no difficulty whatever in feeling it. The point of the little finger could be easily buried in the depression, perhaps the index finger, just the point of it. This was the first time I had attended Mr. Moore, but I was in the habit of seeing him often. If I had been aware of the depression before that evening, I had forgotten it. There was a piece of bone absent then. There was a part of the skull gone, no matter what had happened to it, whether it never was there, or was the result of disease or injury, the piece was gone; and we planted the trephine so that the edge of the instrument just came over the edge of this deficiency. * * I would not expect to find an opening there, although I have seen children born with an opening in the bone where no opening ought to be; but I would come to the conclusion, from looking at his head, that he had lost a piece of bone either from fracture or disease. Of course some diseases would kill bone. I have seen men with no fracture who have lost a part of their skull. * * I could hardly suppose that the absence of the portion of skull was natural; it is only just possible."

Q. As a physician you formed an opinion?

A. I perhaps was guided by the information that was given to me at the time that he had some injury previously.

My opinion at that time was that he had had a fracture of the skull, and lost part of the bone. * * The bone had either been removed by the surgeon, if it had not been knocked out by the cause of injury, or had necrosed, died. Exfoliation is throwing off in thin scales or leaves. I do not think there had been anything of that sort. It is not at all likely. That is a sort of wasting away. I received information then and there about a past injury. The skull has inner and outer densities, and a spongy structure between the two. It is my belief that the whole had disappeared; the entire thickness of bone had gone. In such a case the bone fills in a little from the edges, but leaves a little deficiency in the centre. Then the centre will fill with dense tissue resembling sclerotic tissue covered with scalp. That was the case here."

Q. Was he as well prepared to resist the effects of another blow over this spot?

A. No, he was not."

Dr. Barrick says: "I first saw him, I think, about ten days before his death; he was then complaining of a pain in his head, at some distance from the old depression; that was the burden of his complaint. * * I was aware of the depression in the head before that time. I took notice of it before anything was said about it, because his hair was thin and cut short; but I could not tell how long that was before. * * He said that he had had several tumbles and accidents, and from some of them he led me to believe that this depression arose.

Q. Did you speak to Mr. Moore at all about that injury before you called in the other doctors to consult?

A. He mentioned that to me I think when he was attacked the last time; he complained of pain in his head, about an inch and a half from this old place; he then commenced and related to me that he had received an injury, and that his impression was, that the depression had arisen from that injury. That was what he told me in his last illness. He told the other medical men that. * * The object in taking in part of the old injury was to see the condition

of the bone at that part. * * We were anxious to include part of the old depression to see what the nature of that part was.

Edward Moore, the brother of the deceased, says: "I felt his head after the last accident in the store; the hurt was about two inches from the old injury on the same side of the head: I saw the old injury then; you could not help but see it; I had been aware of it before; it had been cut and healed up; I felt the new injury to see if the skull was broken."

From the evidence of Drs. Nicol and Aikins there can be no doubt that by some means a piece of the bone of the skull of the deceased had been removed. As to the manner in which this was lost, Dr. Nicol says: "I supposed at that time that he had had the skull fractured, and that some surgeon or another had removed the piece of bone," and Dr. Aikens says: "I would come to the conclusion from looking at his head that he had lost a piece of bone, either from fracture or disease." That the conclusion arrived at by these medical gentlemen is correct, is evident from the family physician of the deceased, Dr. Barrick, who says: "that his patient informed him that he had had several tumbles or accidents, and from some of them he led me to believe that this depression arose." And at another time he says: "He then commenced and related to me again that he had received an injury, and that his impression was, that that depression had arisen from that injury; that was what he told me in his last illness."

There can be no doubt from this evidence that the deceased could not truthfully say "No" to the enquiry, "Have you had any personal injury?" Indeed, he must have felt that, for, as the medical examiner informs us, "after he had signed the paper, he passed it back again, rose from his chair, and was about leaving, when he spoke of a fall that he had had upon his head; he said he was not injured by it; the question was repeated to him, and he again asserted that he had had a fall upon his head, and it had not injured him." Upon that, Dr. Wright passed the applicant.

From this it is clear that the accident which injured the head of the deceased had been recalled to his recollection, and thereupon, in place of shewing the depression in the head, the result of this occurrence, he concealed this fact, and whereas there had been an actual and apparent injury, he put the medical examiner off his guard by saying the fall "had not injured him." This, I think, was a fraudulent misrepresentation which should vitiate this policy.

It is impossible to say now what course Dr. Wright would have taken if the answer had been, "there is the present state of my head from the accident, judge for yourself," in place of misleading the doctor by denying that there was an injury. He might have concluded that the skull had been weakened, so that the risk should not have been taken; that, if taken, an increased premium should be paid; or that a less sum than \$25,000 could only be safely risked on the life; or the company might have taken the precaution of asking the opinion of another medical gentleman, and the enquiries consequent upon the display, in place of the concealment, of this depression in the head might have resulted in the information that the deceased was, as one of the witnesses declares, in the habit of going through the world "on the jump," and therefore a risk in which they could not safely invest.

The questions put to the jury by the Chief Justice presented the matter fairly to them: they have erred in the answers given.

I do not think the verdict can stand. At the same time I think the Court below should have allowed another jury to remedy the evident mistake of the former one, and that a new trial should have been granted; and I think this Court should now give the defendants a new trial if they desire it, allowing the costs below and of this appeal to abide the result of the verdict.

As the other members of the Court do not assent to this conclusion, and I think the plaintiff is not entitled to succeed; I am prepared to agree to the allowing of an order to go for the dismissal of this appeal, so that the

plaintiff may have the wrong remedied, if the Supreme Court thinks she is entitled to her verdict.

I think the appeal should be dismissed.

BURTON, J. A.—As to costs. Our practice has been to give costs against the unsuccessful appellant, even in cases where he fails by reason of the Court of Appeal being equally divided.

In this case, however, there is more than a simple division of opinion upon the merits; because at least one member of the Court whose opinion is against the plaintiff on the merits, is not satisfied that the case should be disposed of without being again submitted to a jury.

If this were the Court of last resort, it is not impossible the judgment of the majority of the Court might have been for a new trial, so as not to conclude the plaintiff.

Under these circumstances, we think the proper course is to dismiss the appeal, without costs.

Appeal dismissed, without costs.

BURNHAM V. WADDELL.

Distress—Purchase by landlord—Sale of goods—Change of possession—Practice in Appeal.

The plaintiff caused the goods in question to be distrained for rent in arrear of a farm, and after an unsuccessful attempt by the bailiff to sell them, they were sold with the tenants' consent to the plaintiff, and one P. was put in charge, who, however, allowed the tenants to remain in possession as before. Subsequently the goods were seized and sold by the sheriff under executions against the tenants, whereupon the plaintiff brought trover.

Held, affirming the judgment of the Common Pleas, 28 C. P. 263, that he could not, as landlord, claim as purchaser at the bailiff's sale; nor could he claim as vendee of the tenants, it appearing that there was no registered bill of sale, nor any actual or continued change of possession.

It was urged in appeal for the first time, that some of the goods belonged to one of the tenants, and that the sheriff seized before he had any execution against him. *Held*, that the evidence failed to shew such seizure: and *Quære*, whether the objection should be permitted at this stage.

This was an appeal from a judgment of the Common Pleas, making absolute a rule *nisi* to enter a verdict for the defendant, reported 28 C. P. 263. The facts are fully stated there.

The case was argued on the 20th November, 1878 (a).

H. Cameron, Q. C., for the appellant. The plaintiff proved a valid title to the goods in question against the defendant by virtue of the sale under the distress for rent, there being no execution against the tenants in the sheriff's hands at the time of the sale, and no third person having any right to or claim against the goods at that time: *Woods v. Rankin*, 18 C. P. 44. The cases of *Williams v. Grey*, 23 C. P. 561, and *King v. England*, 4 B. & S. 782, are clearly distinguishable. The purchase of the goods was made by the plaintiff in his own right, and not by or on behalf of the two joint landlords of the tenants, and was therefore valid in any event. If the sale be regarded as one between the tenants and the plaintiff, there was a sufficient change of possession to make the sale valid against creditors: *Maulson v. Commercial Bank*,

(a) *Present*.—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

17 U. C. R. 30; *Heward v. Mitchell*, 10 U. C. R. 535; *Burton et al. v. Bellhouse*, 20 U. C. R. 60; *Foster et al. v. Smith*, 13 U. C. R. 243; *Richardson v. Grey et al.* 29 U. C. R. 360; *Harris and Woodside v. Commercial Bank*, 16 U. C. R. 437; *Gildersleeve v. Ault and Friel*, 16 U. C. R. 401. Even if there was no sufficient change of possession as to some of the goods, there was as to the grain and the rest of the goods, and the plaintiff would be entitled to recover the value of the latter: *Olmstead v. Smith*, 15 U. C. R. 421; *Taylor et al. v. Whittemore*, 10 U. C. R. 440; *Feehan v. Bank of Toronto*, 10 C. P. 32. If the plaintiff was not in possession of the goods by his agent Phillips as owner under the sale, the landlords by their bailiff Phillips were in possession under the distress for the rent, which would not in that case have been at an end, and their lien continued so that the plaintiff would be entitled to recover the rent due, or at least a year's rent. Some of the goods seized had belonged to Warner, one of the tenants, individually, and as the sheriff seized them before he had any execution against Warner, and thereby deprived the plaintiff of them and of their possession to which he was entitled, the plaintiff is entitled to recover the value of those goods: *Williams v. Grey, supra*.

Robinson, Q. C., for the respondent. The cases of *Williams v. Grey*, 23 C. P. 561, and *King v. England*, 4 B. & S. 782, conclusively shew that the plaintiff could not acquire a title to the goods in question as purchaser at the bailiff's sale; and the fact that the purchase was made by him, and not by both landlords, cannot put him in any better position. The statute clearly contemplates a sale to a third party, and it is against public policy that a landlord should be permitted to acquire a title to his tenant's property under such circumstances. To permit this to be done would be allowing him to act as both buyer and seller. Then it is contended that there was a sale as between the parties; but all the requisites of such a sale were wanting. There was no agreement as to price, no acceptance or delivery, and no visible change of possession sufficient to

satisfy the statute. The tenants remained in possession of the farm, working it as usual, and Phillips was only there for the purpose of watching the property. There is no evidence to shew that the sheriff seized any goods belonging to Warner before he had an execution against him. He referred to *Maulson v The Commercial Bank*, 11 U. C. R. 30 ; *R. & J.'s Digest*, 581.

December 6, 1878. (a) Moss, C. J. A.—I am of opinion that the judgment of the Court of Common Pleas should be affirmed. The authorities referred to by the learned Chief Justice shew that the plaintiff's purchase cannot be upheld, if it is rested upon the authority given to his bailiff by the warrant of distress.

But it seems to be equally clear that as between himself and his tenants he could lawfully buy with their consent. What took place was equivalent to their agreeing that the bailiff should be their auctioneer, and that the landlord might take their goods in satisfaction of his rent at prices to be ascertained by public competition. That placed the transaction upon the footing of an ordinary sale *inter partes*, and as there was no bill of sale it was necessary that it should be accompanied by an immediate delivery, and followed by an actual and continued change of possession.

These requisites are not to be found in this case. There was nothing whatever to shew an intending purchaser that the property had passed from the tenants to the landlord, and this observation seems to me to be just as applicable to the grain as to the other chattels. But I need only express my entire concurrence with the reasons which the learned Chief Justice has given in his judgment.

The only question which has caused any difficulty in my mind is that presented by the sixth ground of appeal, which is that some of the goods seized had belonged to one of the tenants, and that the sheriff had seized them before he had any execution against him, and thereby deprived the plaintiff of them and their possession, to which he was entitled.

(a) *Present*.—MOSS, C. J. A., BURTON, PATTERSON, and MORRISON, J. J. A.

On this ground he claims to recover the value of these goods. His argument in effect is that if the sheriff had not wrongfully seized these goods, he might have removed them, and thus perfected his title before the execution against that tenant had attached. If it were established that the sheriff had actually seized before receiving the execution last referred to, questions would arise deserving much serious consideration.

There is no finding as to this fact by the learned Judge, who tried the case without a jury. Indeed, the verdict was only entered *pro formâ*, and the intention seems to have been that the Court should draw inferences of fact from the evidence. But this point does not seem to have been urged upon the argument in term. There is not the slightest trace of it in the report of the arguments of counsel or of the judgment. I do not perceive from the notes of the learned Judge that it was distinctly taken at *Nisi Prius*, although I presume that some reference must have been made to it, because the learned Judge notes that in consequence of some observations from him as to whether the sheriff had ever interfered with Warner's cattle between 18th September and 6th October (the latter being the date of the levying of the execution against that person), Mr. Dulmage was called as a witness, and his testimony is directed to that subject. The Court does not seem to have found how the fact was, or if they did it must be presumed that they determined it adversely to the plaintiff during the argument, and therefore deemed it unnecessary to allude to it when delivering their considered judgment. It certainly was the duty of the plaintiff to have pressed this point upon their attention, and to have obtained their decision. It was peculiarly within their province, and in arriving at a conclusion they would have enjoyed the advantage of one member of the Court being the Judge who had tried the case.

It would be an inconvenient practice if this Court were to be asked to draw inferences which should have been drawn by the Court of first instance, and upon which that

Court would no doubt have pronounced had it been asked to do so.

But as I do not desire to preclude the plaintiff, as there may have been some misconception, I have read the evidence with the view of arriving at a conclusion of my own, and it fails in my opinion to establish that there was an actual seizure before the 6th of October. It is true that a notice of sale was posted up by the sheriff's officer, and that it included some property that belonged to Warner, but this is not conclusive evidence of a seizure.

He does not appear to have ever touched the horses or cattle, or gone through any form of seizing, or exercised any physical restraint. He did not interfere with their use upon the premises, and although he says that if they had attempted to take any of the property he would have tried to prevent them, there is no evidence of any such attempt. He says that he knew that the grey horses were not Prout's, but Warner's, and he of course knew that the execution was against Prout alone. The fair presumption therefore is, that if the plaintiff had demanded these as his property by purchase from Warner, he would not have prevented their removal.

The case appears to be different with regard to the wheat, of which there was no doubt an actual seizure. An undivided half of this belonged to Warner, and it may be that the sheriff incurred some liability for excluding the plaintiff from the possession of this property, but as this point was not suggested, I presume it was susceptible of explanation. At any rate we are not in a position to give it effect.

On the whole, I think the appeal should be dismissed, with costs.

PATTERSON, J. A.—The only remark I have to make about the judgment of the Court of Common Pleas, delivered by Hagarty, C. J., who then presided in that Court, is that I entirely agree with it. The two questions discussed and decided against the plaintiff, viz., that he could not be

treated as a purchaser from his own bailiff, or, more properly, from himself; and that though he could well claim to have purchased from the tenants Prout and Warner, yet there had not been such a change of the possession of any of the goods seized by the sheriff as would enable the plaintiff to hold them against the execution creditors of his vendors, are treated so fully as to leave nothing to be added.

But the appellant has put forward as grounds of appeal two other objections to the verdict being entered for the defendant, which, as far as I can gather from the report of the case in the Court below, do not seem to have been made prominent, even if they were at all insisted on in that Court.

One of these objections is, that if the plaintiff's purchase from the bailiff is held invalid, he must be taken to have retained the possession of the goods under the distress for rent; and so was rightfully in possession as against the sheriff.

This is disposed of by directing attention to the fact that there was a perfectly good sale as between the tenants and the plaintiff, and that the plaintiff had taken the goods in satisfaction of the rent.

A claim appended to this ground of appeal, that the plaintiff should at least have recovered a year's rent, points to a cause of action different from anything which arises on this record.

The other objection is that the sheriff, having an execution against Prout alone, seized¹ goods which belonged to Warner alone; and that the plaintiff should recover for those goods.

This point appears to have been raised at the trial, the property indicated as Warner's being two horses, two cows, and two heifers. It is not found, however, as a fact that the sheriff interfered with them, or that the plaintiff might not have removed them at any time before the 6th October, when the *fi. fa.* against both tenants was delivered to the sheriff to be executed.

I should imagine that the plaintiff, who was very little

at the farm, and who on the occasion of his purchase of the goods in satisfaction of the rent had no reason to discriminate between what was Warner's and what was Prout's, may not have been aware that Prout was not interested in all the goods distrained. If he knew that a portion had belonged to Warner alone, it is not easy to account for his being so careless of his own interest as to postpone any attempt to take actual possession until it was too late.

The case now set up for the plaintiff is not unlike that of *Mayhew v. Herrick*, 7 C. B. 229, in which one partner recovered for the seizure of his separate goods under an execution against his co-partner, and for interference with his enjoyment of the joint property, only here no seizure of the separate property is shewn, and no complaint is founded on the joint ownership of the grain. I agree that the appeal must be dismissed, with costs.

BURTON and MORRISON, J.J.A., concurred.

Appeal dismissed.

IN RE MCARTHUR AND THE CORPORATION OF THE
TOWNSHIP OF SOUTHWOLD.*By-law—Closing up road—Ingress and egress—Injurious affected—
Compensation.*

Held, reversing the judgment of the Common Pleas, 29 C. P. 216, that section 504 of R. S. O., ch. 174—providing that no council shall close up any public road, “whereby any person will be excluded from ingress and egress to and from his lands or place of residence over such road, unless the council, in addition to compensation, also provides for the use of such person some other convenient road or way of access to the said lands or residence”—only applies to cases where the only means or convenient means of access is over the road closed up, and not where there is already another existing way of access though a less convenient one. It is not a condition precedent under sec. 504 that compensation should be provided for in the by-law closing up the road.

THIS was an appeal from the judgment of the Court of Common Pleas, quashing several by-laws passed by the Municipal Council of the township of Southwold, numbered 248, 251, 252, 253, 254, and 255, reported 29 C. P. 216. The facts are stated there, and in the judgments on this appeal.

The case was argued on the 19th November, 1878 (a).

Becher, Q.C., *Street* with him, for the appellants. The by-laws ordered by the Court of Common Pleas to be quashed were legally passed by the council of the corporation of the township of Southwold, who acted within and in the exercise of the powers conferred upon them by law in passing the said by-laws. The evidence before the Court shewed that the lands of the respondent were not injuriously affected by the closing of the Muncey road, and that another convenient road or way of access to his land and residence was already in existence at the time of the passing of the by-law closing that road. Even if the respondent's lands were injuriously affected by the closing of this road, the payment by the council of compensation is not a condition precedent to their right to pass the by-law to close it: *Re Thurston and the Corporation of*

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Verulam, 25 C. P. 593, R. S. O., ch. 174, sec. 504. The compensation intended by sec. 504 is secured to the respondent, if he be entitled to compensation, by R. S. O. ch. 174, sec. 456, and the arbitration clauses of that Act, sections 367, *et seq.*, but he has never asked compensation from the council. No illegality is apparent upon the face of the by-law No. 248, and the Court below should therefore, under the circumstances, have refused to interfere; especially as sales and conveyances had been made under it and possession taken under them, and the respondent had allowed three terms to pass without making his application: *Re Thurston and Corporation of Verulam*, 25 C. P. 593; *Re Secord and Corporation of Lincoln*, 24 U. C. R. 147; *Re Choate and Corporation of Hope*, 16 U. C. R. 424; *Re Taylor and Corporation of West Williams*, 30 U. C. R. 348; *Re Scarlett v. Corporation of York*, 14 C. P. 161. The respondent by his conduct at the sale has estopped himself from seeking to quash the by-laws in question: *Cairncross v. Lorimer*, 7 Jur. N. S. 150; *Kerr on Fraud*, p. 82. The closing of the road did not prevent the respondent from ingress and egress to and from his lands or place of residence, and the 504th section of ch. 174 of the Revised Statutes is not applicable.

Hodgins, Q. C., (*Spragge* with him,) for the respondent. The purchasers under the by-laws, who are the appellants in this matter, have no right of appeal from the judgment of the Court below, as the rule was made absolute against the township alone. The evidence before the Court of Common Pleas showed that the council of the corporation, in closing up the public road in question, acted in violation of the provisions of the 504th section of R. S. O., ch. 174, since it excluded the respondent from ingress and egress to and from his lands and place of residence over such road, and neither provided nor allowed him compensation therefor, nor provided for his use some other convenient road or way of access to his lands and residence: *Re Moore and Township of Esquesing*, 21 C. P. 277; *Re Falle and Corporation of Tilsonburg*, 23 C. P. 167; *Re Annes and*

Corporation of Mariposa, 25 C. P. 133. It is submitted that these appellants do not stand in the place of the council in respect of the by-laws or of the acts complained of, and cannot set up rights which the council decline to set up. The evidence shows that [the respondent has in no way waived his right to object to the proceedings of the council in closing up the road in question. They referred to *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. 243; *Yeomans and the Corporation of Wellington*, 43 U. C. R. 522.

December 6th, 1878 (a). BURTON, J. A.—The principal by-law complained of, and which has been quashed by the order appealed against, was passed after due notice and the formalities required by law, on the 6th day of August, 1877. This was the by-law closing the Muncey Road. The other by-laws were merely for the sale and conveyance to the purchasers of the portions of the land which by force of the first by-law had ceased to be a public highway, and were not passed until the 14th day of January following. The application to the Court to quash the by-laws was made on the 26th of March last.

The objections to the principal by-law were, that by its passage the applicant was excluded from ingress and egress to and from his land over such road, and that the council had not provided compensation, and some other convenient road or way of access to the said land for the uses of the applicant.

Judging from the affidavits and the arguments advanced before us, a good deal of misapprehension appears to exist in reference to the compensation contemplated by the statute. As the law stood, previously to the Act of 1873, no compensation was payable to any persons but the owners of land entered upon, taken, used, or occupied by the corporation, in the exercise of its powers in respect to roads, streets, and other public communications, as to

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drains and common sewers, such compensation being limited to the damages necessarily resulting from the exercise of such powers, beyond any advantage which the claimants might derive from the contemplated work.

By that Act the compensation was extended to the occupiers of or other persons interested in not only the property taken, *but property injuriously affected* by the exercise of the powers of the corporation.

I take it then to be clear that upon the closing of any road prior to the Act of 1873, which the corporation was authorized to close, the owners of the adjoining lands would not have been entitled to claim compensation; and it is clear that under the law as it stood previously to that date, the payment of the compensation was not a condition precedent to the by-law taking effect;—Sub-sec. 12 of sec. 353, 29 and 30 Vic. ch. 51, in terms providing that in case the by-law authorized the entry upon and use of the property before the award was made, but this authority had not been acted upon, the award should not be binding on the corporation unless adopted by by-law within six weeks after the making of the award; and if the same were not so adopted, the original by-law should be deemed to be repealed, the property stand as if no by-law had been passed, and the only penalty upon the corporation, that they became liable for the costs of the arbitration. This provision, so far as it relates to property to be entered upon and used in the exercise of the powers of the corporation in regard to roads, is continued by the Act of 1873, sec. 294, and is to be found in the Revised Statutes of Ontario, ch. 174, sec. 384.

In the opening of a new road, one can readily understand that the damages might not be confined to the value of the land taken for the works itself, but that the adjoining lands, by the erection of an embankment or otherwise, might be injuriously affected, and as the owner of such land would be without remedy if compensation were not given by the statute which authorizes the act, the Legislature amended the Act in the way I have indicated

above, and although the instances in which land may be injuriously affected by the closing of a road will be much rarer than when works are executed in opening a new road, still one can imagine cases where such might be the case, and hence the words first to be found in the Act of 1873, sec. 422, which provide that the council, "in addition to compensation, shall also provide, for the use of such persons, some other convenient road, or way of access" to the land of the party affected; but the compensation here referred to manifestly does not include such claims as the applicant puts forward in this case on behalf of himself and those acting with him, such as having to travel a few additional rods in order to reach a particular cheese factory—or personal inconveniences of that nature. These are inconveniences to which other inhabitants not having farms bordering on the road are subjected equally with himself. The compensation contemplated by the statute is the value of the land taken, and the injury to lands injuriously affected by the Act of the corporation.

It is not shewn upon this application that the lands of the applicant were in the slightest degree injuriously affected by what has been done, and no such claim was made before the council. The Act provides that any person whose land may be prejudicially affected, and who presents a petition to that effect, may be heard in person or by counsel; and if a claim such as the law contemplates had been presented and rejected, it was still open to the applicant, after the passing of the by-law, to proceed to arbitration under the 374th and subsequent sections of the Act.

The omission then to make provision in the by-law for compensation is not essential to its validity, and it is clear upon the evidence that no claim for compensation such as is contemplated by the statute was ever urged before the council previously to its passage or since.

But I am of opinion that this is not a road within the prohibition contained in the 504th section. If the con-

struction of the section contended for be correct, it is not easy to see what road in the country could be closed without the express consent of the owners of the adjoining lands. Every such owner has peculiar facilities of ingress and egress to and from his land over the road abutting it. The counsel for the respondents felt a difficulty in maintaining a position which would in effect render the power of the municipalities to close highways a dead letter, and limited it to cases where the owner had actually at the time of the passing of the by-law exercised his right by opening gateways or entrances from the highway to his land, but it would be a strange construction that would make a man's rights to the full enjoyment of the advantages of a road abutting upon his land dependent upon such an accident. I think that the words of the statute as originally framed, without any violence to them, may be fairly construed to mean that if the road proposed to be closed was the only means of access, or convenient means of access, to the land of any person, that road should not be closed; and that the amended Act extended the power of the council, and enabled them to close such a road provided they previously furnished the proprietor with some other convenient road or way of access to his land. In the present case the owner of the land is not excluded from ingress and egress to his land, and the test suggested by the learned counsel for the appellants is one that has always struck me as a reasonable one. "If there is an existing road adjoining the owner's land, which would have satisfied the requirements of the law, if furnished or provided for the use of such owner in lieu of the highway closed, then the case is not within the 504th section."

As regards the case suggested by Mr. Hodgins of a council closing a street in a city upon which an expensive dwelling house had been erected, claiming that the owners had access to it from a stable yard and street in the rear, it is sufficient perhaps to say that if a council so misconducted themselves, the Courts would be found strong enough to prevent any such unjust proceeding; but apply-

ing the tests to which I have referred, they would have no power to pass such a bylaw, the closed street being the only convenient means of access to the dwelling.

I do not understand the council, or the parties rather, who now appear in support of the by-law which their predecessors in office passed, to contend that the opening of the road between lots 6 and 7, or that between lots 12 and 13 affords compensation to the owners of the lands abutting on the Muncey Road, or that they are regarded as a substitution for the road closed. The opening of those roads is merely referred to as a reason why a road, crooked, narrow, and insufficient, should in the public interest be now closed, and the municipality relieved from the expense of keeping it in repair.

Entertaining this view of the law, I am of opinion that the by-laws should not have been quashed, and that this appeal should be allowed, with costs to be paid by the respondent Donald McArthur.

PATTERSON, J. A.—By-law 248 was passed on the 6th of July, 1877, to close a road called the Muncey Road. This was not an original allowance, but was established by a by-law passed in 1851. It ran from the line between the second and third concessions of Southwold, along the side line between lots 9 and 10 in the third concession, then crossed lot nine in the fourth concession obliquely, and ran down the line between lots 8 and 9 in the fourth concession to the line between the fourth and fifth concessions. The applicant, Donald McArthur, occupies the south part of lot 9 in the third concession. The concession road between the third and fourth concessions runs along the end of his land, and the Muncey Road along the west side of it.

The other by-laws authorized the sale of portions of the road which was closed by No. 248.

By-law 248 recites, amongst other things, that in consequence of the proximity of the side roads to the Muncey Road there is no necessity for keeping it open. The side roads referred to are one to the east of the applicant's lot,

between lots 6 and 7 : and one to the west, between lots 12 and 13.

The grounds on which the by-law is attacked are :

That by passing it the council have excluded the applicant and other parties from ingress and egress to and from his and their lands or places of residence over the said road ; and the said council have not provided compensation, and some other convenient road or way of access to the said lands or residences for the use of the applicant and the other parties.

Mr. Street, to whom we are indebted for a very careful and able discussion of the questions, rested his argument in favour of the validity of the by-law mainly on two positions.

1. That all conditions precedent to the right to close a road, required by section 504 of the Municipal Institutions' Act (R. S. O. ch. 174), have been fulfilled; because another convenient way of access is provided by means of the concession road at the south of the applicant's land, and the making compensation is not a condition precedent.

2. That section 504 does not apply, because, upon the proper construction of that clause, the closing of this road does not exclude the applicant from ingress and egress.

I refer here to section 504 of the Revised Statute, as it does not differ in its terms from section 422 of the Act of 1873, 36 Vic., ch. 48.

There can be no doubt as to the applicant having "another convenient way of access." It is not required that it shall be as convenient as the road which the by-law closes, otherwise there would be no question of compensation.

We have not to discuss the comparative advantage of one road or the other. Access is afforded by the concession road. It is not denied that it is convenient access. There are no physical obstacles in the way of it as a mode of access. That requisite is therefore complied with. But the section says that the council shall not close a road, "whereby any person will be excluded from ingress and

egress to and from his lands or place of residence over such road, unless the council, *in addition to compensation*, also provides for the use of such person some other convenient road or way of access to the said lands or residence."

It is contended that this makes it a condition precedent to the *passing of the by-law* to close the road, that compensation shall be given or at all events provided for in the by-law. The statute certainly does not say so in so many words, nor does it even say expressly for what the compensation is to be given.

The clause evidently refers to compensation as something otherwise provided for, and not as a right originating in and depending on the mere allusion contained in the words "in addition to compensation."

The reference is to section 456 (or section 373 of 36.Vic. c. 48,) which enacts that "every council shall make to the owners or occupiers of, or other persons interested in real property entered upon, taken or used by the corporation in the exercise of any of its powers, or injuriously affected by the exercise of its powers, due compensation for any damages (including cost of fencing when required), necessarily resulting from the exercise of such powers, beyond any advantage which the claimant may derive from the contemplated work; and any claim for such compensation, if not mutually agreed upon, shall be determined by arbitration under this Act."

The arbitration clauses in the Revised Statute, are sections 367 to 385. Section 373 provides that, "In case of an arbitration between a municipal corporation and the owners or occupiers of, or other persons interested in real property entered upon, taken, or used by the corporation in the exercise of any of its powers, or injuriously affected thereby, if, *after the passing of the by-law*, any person interested in the property appoints and gives due notice to the head of the council of his appointment of an arbitrator to determine the compensation to which such person is entitled, the head of the council shall, if authorized by by-law, within seven

days appoint a second arbitrator, and give notice thereof to the other party, and shall express clearly in the notice what powers the council intends to exercise with respect to the property, describing it."

These last words evidently apply only when property is entered upon, taken, or used, not when it is merely injuriously affected.

Until 1873 the Municipal Acts only provided for compensation being given when lands were entered upon, taken, or used by the corporation in the exercise of its powers in respect to roads, streets or other public communications, or to drains and common sewers; Consol. Stats. U. C., ch. 54, sec. 323; 29 & 30 Vic., ch. 51, sec. 325. And the arbitration clauses used the same language: Consol. Stats. U. C. ch. 54, sec. 358, subsec. 4; 29 & 30 Vic., ch. 51, sec. 353, subsec. 4.

The extension of the right to compensation to injuries from the exercise of any of the powers of the corporation, and to cases in which lands were injuriously affected, though not entered upon, taken, or used, was made in 1873 by section 373 of the Act of that year, which I have already quoted.

But the framer of that Act overlooked the necessity for adapting the arbitration clause to the wider range of the right to compensation; and that clause (sec. 283) was left as it had stood in the former Acts until 1877, when (by 40 Vic. ch. 7, schedule A, No. 177) it was made to assume its present form; the concluding words remaining unaltered, and applying to the old subjects without reaching the new ones.

Returning to section 504, after this glance at the provisions for compensation, and bearing in mind that the closing of a road which forms a means of access to one's land may injuriously affect the land by reducing its value, or interfering with its owner's enjoyment of it: *Beckett v. Midland R.W. Co.*, L. R. 3 C. P. 82; and, on the other hand, that the value of the land may be greatly enhanced by the substitution of one road for another; and having regard

to that provision of the arbitration clause (sec. 373) which points in so many words to the first steps towards the arbitration by which the claim for compensation is to be adjudicated upon being taken *after the passing of the by-law*, it is to my apprehension perfectly clear that the words "in addition to compensation," were not inserted as a declaration that compensation was to be provided at all events, and even though the lands might happen to be beneficially instead of injuriously affected; or that in a proper case for compensation the matter was to be governed by any rule or procedure but the general rule provided by the Act, and the procedure which was to be initiated after the passing of the by-law; or as anything more than a saving of the land owner's rights under the compensation clauses, while another convenient way of access was at all events secured to him.

I entirely concur with the opinion expressed by Mr. Justice Gwynne in giving the judgment of the Court of Common Pleas, that it clearly was the intention of the Legislature that the parties coming within the description of persons excluded from ingress and egress to and from their lands or place of residence over the road intended to be closed, should be compensated for any loss sustained in being deprived of such ingress and egress.

I find, in the general enactments of the statute to which I have referred, ample provision for such compensation; and I find care taken in the framing of section 504, by the use of the words, "in addition to compensation," to guard against the express provision for the substituted road being construed as precluding the land owner from resorting to those general enactments.

I am also of opinion that this is not one of the cases of exclusion from ingress and egress within the meaning of the clause, because there was already another mode of ingress and egress to and from the land in question by means of the concession road which ran at the south end of the lot.

In *Vandecar v. Corporation of East Oxford*, 3 App. R.

131, lately decided in this Court, I alluded to this construction as one of which the clause was capable; but the question did not, as in the present case, come directly up for decision.

Looking at the law as it stood before 1873, and at the alteration then made, I do not see room for reasonable doubt as to the intention and effect of the statutes.

In its former shape the law forbade the closing of any road whereby any person should be excluded from ingress and egress to and from his lands or place of residence, over such road, but declared that all such roads should remain open for the use of the person who required the same.

It is obvious that if this forbade the closing of any road which afforded a way of access to any person's lands or residence, no road whatever could have been closed, unless perhaps a road through ungranted and unoccupied lands of the Crown.

I think Mr. Street correctly pointed to the closing words of the clause as the key to its construction—"the person who requires the same,"—and that the true reading was, no council shall close any road whereby any person who requires the same for ingress and egress to and from his lands or residence will be excluded from such ingress and egress. The person who required the road was the person who had no other ingress and egress except over that road.

The amendment made in 1873 very strongly points to this as the correct reading of the law.

It permits the closing of all roads, but adds two important and suggestive provisions. One is that another convenient way of access is to be provided. The other is that this is to be "in addition to compensation."

There is no suggestion in the clause that it deals with a case where there is already another existing way of access. Power is given to close a road, which power did not exist before, because by closing it a person would be shut out from his land. It may now be closed. The closing it will shut him out from his land just as it would

have done before; therefore the new power is conditioned upon another way of access being provided. Provide a new way and close the old one. You thus place the land owner in exactly the position he would have occupied if, having already two ways, the council closed one of them, which the old law permitted. The object of the amendment strikes me as being to facilitate the operations of the council, while the rights of the land owners are preserved. A road which could not be closed under the old law, may be closed under the amended law. It must not be closed so as to exclude any one from access to his land or residence. If that will be the effect, another access must be provided. If he already has another access it has not to be provided. In that case the closing of one access does not exclude him, and under the old law did not exclude him. The reference to compensation does not militate against this view, because by the same Act of 1873, for the first time, compensation was given when lands were injuriously affected, without being entered upon, taken, or used.

Under the old law, as I construe it, this Muncey Road might have been closed, and possibly the closing of it might have injuriously affected the applicant's farm, notwithstanding his having another "convenient way of access" to it, but the law made no provision for his compensation. The same thing might be said in case the council, without closing the road, altered it in a way to make it less serviceable to the applicant, or by making a cutting or an embankment, made his access difficult or dangerous. He had no remedy, and could demand no compensation.

The new law giving him compensation for injury sustained from the exercise of any of the powers of the council, secures it to him even though another way is provided, as it does in case one of two existing ways is stopped; but the securing of it under these circumstances affords no argument against my construction of the statute.

This view of the statute differs from that acted upon by

by the Court of Common Pleas in *Moore v. Esquesing*, 21 C. P. 277. I gather from the judgment of the learned Chief Justice that the Court was much influenced by the hardship and injustice which a municipal council might occasion by closing a road of great value and importance to a particular individual, if the circumstance of his having another, though a less convenient way of access, made him powerless to resist them.

That case was decided in 1870. Since the delivery of that judgment, and possibly in consequence of what was then thrown out, a safeguard against oppressive action of the kind has been provided by the creation of the liability to make compensation when the exercise of the powers of the council injuriously affects the property of the landowner. We can therefore act upon a different process of reasoning without any fear of the dangers then pointed out.

In *Re Thurston and the Corporation of Verulam*, 25 C. P. 593, the present learned Chief Justice of the Common Pleas, who heard the case when sitting alone for the Court, held a by-law valid, notwithstanding the absence from it of any provision for compensation or for a substituted way of access, upon grounds which I think were substantially the same as those on which I have proceeded,

I think the appeal should be allowed with costs.

MOSS, C. J. A., and MORRISON, J. A., concurred.

Appeal allowed.

ROSE ET AL. V. HICKEY ET AL.

Statute of Frauds—Absolute deed—Parol evidence to shew a right to redeem—Admissibility of.

The bill, which was filed in 1876, by the children and heirs-at-law of J. W. R., alleged that the deceased had, in 1861, conveyed certain real estate to his brother I. N. R., upon the express trust that he would advance him \$1,000, and hold the property as security for the repayment of that sum with interest: that he never did advance that sum: that J. W. R. died in 1872: that I. N. R. died in 1874, having devised this property to his son: that the trusts upon which it had been conveyed had been fulfilled, and sought an account of I. N. R.'s dealings therewith. The defendants, the executor and executrix of I. N. R., set up an absolute sale, and relied on the Statute of Frauds and the Statute of Limitations.

It was proved at the hearing that immediately after the execution of the deed, which was an absolute conveyance of the lands in question for \$6,000, subject to certain mortgages, I. N. R. had gone into possession: that parties applying to J. W. R. for the purchase of lots were told by him that he had sold the property to I. N. R. C. R., a son of J. W. R., swore that his father, being in difficulties in 1861, I. N. R. told him (C. R.) that he would take an assignment of the property, pay off certain mortgages thereon, advance J. W. R. \$1,000, and reconvey it at any time on payment of advances and interest. In a letter to C. R. in 1865, J. W. R. said that in writing to I. N. R., he had denied that "the sale was in any other light than that in which you placed it. * * I also asked him if he is willing to relinquish the property on receiving his advances." An account rendered by I. N. R. was produced, dated September 16, 1863, headed, "J. W. R., Debtor. Amounts paid for you," composed of items which, it was alleged, formed the purchase money of the premises in question. On the 23rd February, 1865, I. N. R. wrote to J. W. R. in reply to a letter from him, "Pay me my advances as agreed with C., and you can have your property." Proudfoot, V. C., made a decree directing an account, and allowing the plaintiffs to redeem the lands on payment of the amount due to the defendants in respect of advances made.

Held, BLAKE, V. C., dissenting, that the evidence, which is more fully set out below, shewed that the transaction was a sale, and the decree was reversed.

BLAKE, V. C.—Although under all the circumstances he would, on the evidence, have formed a conclusion adverse to the plaintiffs, yet, held, that parol evidence was admissible, and he was not prepared to decide against the judgment of the Vice-Chancellor, who was placed in a so much more advantageous position for determining the weight to be attached to the evidence.

Per PATTERSON, J. A., that oral evidence was not admissible to vary the deed.

Per BURTON, J. A., the evidence of C. required corroboration under 36 Vic. ch. 10, and was not corroborated in any material particular.

THIS was an appeal from a decision of Proudfoot, V. C., directing an account of the real and personal property, in a suit by the children and heirs-at-law of the late Jesse W. Rose, one of them being also administrator of his per-

sonal estate, against the executor and executrix of his brother, the late Isaac Newton Rose, and the devisees under his will, seeking a declaration that the real and personal estate mentioned in the bill were transferred upon certain trusts, and praying an account of his dealings therewith, and for redemption.

The facts are fully stated in the judgments.

The case was argued on the 14th June, 1878. (a)

Mowat, Q.C., and *Blake*, Q.C., for the appellant. The suit is barred by laches, delay, and acquiescence. It is brought to qualify the terms of an absolute conveyance and to establish a trust nearly seventeen years after the transaction, the grantee having been in possession all the time, dealing with the property as his own in accordance with the deed, and having devised it to one of his infant children as his share of his estate, after the death of the two principals in the transaction and after the loss and destruction of documents: *Beckford v. Wade*, 17 Ves. 97; *Gregory v. Gregory*, G. Cooper 201, Jacob 631; *Champion v. Rigby*, 1 R. & M. 539, 19 L. J. N. S. Chy. 211; *Roberts v. Tunstall*, 4 Ha. 257; *Clarke v. Hart*, 6 H. L. Cas. 655; *Sibbering v. Balcarras*, 3 DeG. & Sm. 735; *Browne v. Cross*, 14 Beav. 112; *Reimers v. Druce*, 23 Beav. 156; *Baker v. Read*, 18 Beav. 398; *Harcourt v. White*, 28 Beav. 303; *Hardwick v. Wright*, 35 Beav. 133; *Mackintosh v. Stuart*, 36 Beav. 21; *Clegg v. Edmonson*, 8 DeG. M. & G. 787; *Wright v. Vanderplank*, 2 K. & J. 1, 8 DeG. M. & G. 133; *Jarrat v. Aldam*, L. R. 9 Eq. 463; *Lehmann v. McArthur*, L. R. 3 Chy. 500; *Turner v. Collins*, L. R. 7 Chy. 329; *Skae v. Chapman*, 21 Gr. 534. The alleged trust or agreement is not proved. The proof must be by writing to satisfy the Statute of Frauds. The writing relied on is the letter of the 23rd of February, 1865, but looking at the whole correspondence of which the letter is a part, it is clear the transaction was not a trust such as is alleged in the bill, nor a loan of money, but an

(a) *Present*.—BURTON, PATTERSON, and MORRISON, J.A., and BLAKE, V.C.

actual sale, and that if there was any agreement for giving back the property it was that the vendor was to have an option of re-purchase. See the letter of 17th of May, 1862, a few months after the transaction, in which Jesse describes the transaction as a sale; also letters of 17th January, 7th February, 20th February, and 21st February. All these were written just before that relied on of 23rd February, 1865, and establish clearly that there was an actual sale, and no trust or any loan of money. This is made further clear by the letter of 28th March, written by Jesse a few days afterwards to his son, where he says his brother offers to give up the land *at cost*. See also the letters of 6th March and 14th March, and 24th March, about the same time. In the letter of the 14th March, he says, I. N. Rose only bought what was not previously sold. Not only therefore is the alleged trust or agreement not proved by the writings, but it is disproved. The oral evidence should have been rejected as there was nothing proved inconsistent with the absolute character of the deed to let in parol evidence, according to the authorities: *Le Targe & De Tuyl*, 1 Gr. 227; *Green-shields v. Barnhart*, 3 Gr. 1; *Tylee v. Landes*, 15 Gr. 99; *Howland v. Stewart*, 2 Gr. 61; *Stewart v. Horton*, 2 Gr. 45; 9 Moo. P. C. 18; *Holmes v. Matthews*, 3 Gr. 379, 5 Gr. 1; *Bernard v. Walker*, 2 E. & A. 121; *McAlpine v. How*, 9 Gr. 372; *Campbell v. Durkin*, 17 Gr. 80.

The cases of *Lincoln v. Wright* 4 DeG. & J. 16, *Davies v. Otty*, 235 Beav. 208, and *Haigh v. Kaye*, L. R., 7 Ch. 469, are relied upon, but all these cases were cases of actual fraud, in which no valuable consideration was paid, and the grantor was left in possession. But the parol testimony, even if admissible, does not establish the case. No reliance can be placed on an account of a conversation after seventeen years. The plaintiff personally gave instructions for the suit, and the case stated in the original bill, in the amended bill, in his cross-examination on his bill, and his evidence on the hearing, all vary in material particulars. He alleges that the personal estate was conveyed on the same trusts as the land, yet he witnessed the deed, and until it was produced

to him had forgotten all about it. The plaintiff was not present when the deed was executed, and knew nothing of what passed between the parties at the time or for twenty-four hours previously. He does not call Mr. A. G. McDounell who prepared the deed, nor Mr. Tyrrell who witnessed it, though both are living. Much may and must have passed between the parties themselves, at and before the execution of the deed, which cannot be shown, owing to the death of the parties. Isaac N. Rose being dead, the plaintiff must be corroborated, and there is no corroboration, but the reverse. The statement of the plaintiff, in his cross-examination, that the deed was made to defraud creditors, is irreconcilable with the case made by the bill, or attempted to be made by the evidence. The real transaction was an absolute sale for \$6,000, the purchase-money to be applied in paying off incumbrances and liabilities, with the option to the vendor to re-purchase. The consideration was paid and the purchaser took possession. This option is one which the vendor was bound to avail himself of within a reasonable time. The right to exercise it was conceded by the letter of 23rd February, 1865, although nearly four years had elapsed. But this was not what Jesse wanted. He was contending for a totally different agreement. viz., that the price was \$6,000, or at least \$4,000, besides the incumbrances. See the letters and Willard's evidence, particularly the letter to his son. Isaac had offered to give up the land at cost, but Jesse speaks of this offer as one not favourable; why not, if that was the bargain? The truth is, there was then no value in the land. It was not worth buying back at the price, and although he had this distinct offer in February, 1865, an offer several times renewed afterwards, it was not acted upon, and it is out of the question to give relief now in a Court of Equity. After 1865, Jesse Rose abandoned all intention of buying the property back, and instead of offering to pay was constantly applying to his brother for loans or gifts of money. The transaction is alleged by the plaintiff, in his cross-examination, to have been for the purpose of defrauding, hindering

and delaying creditors. If so the plaintiff can have no relief. If necessary to be pleaded as a defence, this should have been allowed at the hearing, the proof coming from the plaintiff himself, and not being within the knowledge of the defendants, and the defendant principally affected being an infant. For the same reason it was unnecessary to plead it, as the plaintiff could not be prejudiced. But coming from the plaintiff, in cross-examination on his bill, it is the same as if he had stated it in his bill, and is in effect pleaded: *Mathers v. Short*, 14 Gr., 254.

Bethune, Q.C., for the respondent. Although the conveyance was absolute in form, the real transaction was one of mortgage with power to sell, or a trust to sell to pay advances and to hold the residue for Jesse Rose. Isaac Newton Rose agreed to make certain advances to Jesse Rose, but Jesse still retained an interest in the property and a right to redeem. The letter written by Isaac to Jesse, and found amongst Jesse's papers, bears date the 23rd February, 1865. This letter was an answer to the letters dated respectively 3rd February and the 17th February, 1865, written by Jesse to Isaac, and must be read in connection with these letters. The letter of the 23rd February, 1865, refers to a bargain made with Colin Rose, one of the respondents, and could not refer to any other property than the one in question. This letter shows that a bargain was made with Colin Rose whereby the property should be redeemed by Jesse. At all events it shows that the conveyance was not intended to be an absolute conveyance of the land to Isaac, and was sufficient to let in the parol testimony to shew what the real transaction was: *Barnard v. Walker*, 2 E. & A. 139; *Lincoln v. Wright*, 4 DeG. & J. 16. The parol evidence was therefore properly admitted, and was quite sufficient to establish the plaintiffs' case and to warrant the decree. It is shewn that Isaac Rose kept an account of the advances made to or on account of Jesse Rose. The Vice-Chancellor believed Colin Rose, and there was ample evidence to corroborate his testimony. The appellants should have called A. G. McDonnell, who was solicitor for the

defendants, and had been Isaac Rose's solicitor. The respondents were not obliged to call him, as they were able to establish their case by other evidence. Mr. Tyrrell was in Court and could have been called by the appellants if they had chosen to call him, but Mr. Tyrrell knew nothing of the bargain which had been made with Isaac Rose before the execution of the conveyance. The Vice-Chancellor was right in refusing to allow the defendants to set up as a defence that the conveyance was made to defraud creditors, as that defence is entirely inconsistent with the defence on the record : *Hough v. Kaye*, cited by the appellants.

December 6, 1878. (a) BURTON, J. A.—As originally framed, the case set up by the bill was, that Jesse W. Rose, while seized and possessed of certain real and personal property, formed the intention of leaving this Province and going into business in the Province of Quebec, (*being at the time indebted to various persons, and desiring to have the same settled up and adjusted*), and by deed of the 12th December, 1861, conveyed the lands in question to Isaac, and at the same time transferred a large amount of personal property.

The clause in brackets, relating to the debts, was struck out in the amended bill, so that no reference whatever is therein made to debts, but, probably from an oversight, the third paragraph which declares the trusts was not altered in this respect, whilst the reference to the advance of \$1000 is for the first time made in the amendment to that paragraph. The paragraph generally alleges that the real and personal property was so conveyed and transferred to Isaac, upon the express trust *that he would advance \$1000, and hold the property as security for the repayment of the said sum, and interest*, and would, if necessary, sell such portions as might be required, in order to pay the said debts, although, as I have already remarked, no debts have previously been referred to in the amended bill.

(a) *Present*.—BURTON, PATTERSON, and MORRISON, JJ.A., and BLAKE, V.C.

The bill then alleges that Isaac never did advance the said sum of \$1,000 as agreed upon, but that he nevertheless sold from time to time portions of the estate, and disposed of the personal estate and applied the proceeds in paying the debts.

There is no pretence for saying that the personal property was transferred upon any such trust, and the decree to that extent is manifestly erroneous; but the more serious question remains for consideration, as to whether, assuming that there was a sufficient foundation laid for the admission of parol evidence, there is evidence to warrant the decree as to the real estate.

The bill was not filed until June, 1876, shortly before the Act limiting the period for bringing actions relating to real estate to ten years, and although no inference should be drawn unfavourable to the plaintiffs from that circumstance alone, they cannot complain if after so great a delay Courts require their claims to be made out by the clearest and most satisfactory evidence, especially after the death of the party whose estate is sought to be affected by it; but our own Act, R. S. O., ch. 62, sec. 10, now declares that "in a suit by or against the heirs, executors, administrators, or assigns of a deceased person, an opposite or interested party to the suit shall not obtain a verdict, judgment, or decision, on his own evidence in any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence."

Apart, however, from the Statute, Courts have been very reluctant to act exclusively upon the evidence of one of the parties to the suit after the death of the other party. In *Hill v. Wilson*, L. R. 8 Ch. 888, where a decree had been made upon such evidence tending to shew that a written document did not mean what it said, the Lords Justices in reversing the decree remark, that even if such evidence be legally admissible for any purpose, the interests of mankind imperatively require that unless corroborated it should be wholly disregarded.

It must be borne in mind that immediately after the

execution of the deed of December, 1861, the possession was changed, the grantee, Isaac, going into possession, and it would seem that until many months after the commencement of the suit the plaintiff had nothing whatever in writing upon which he could rely to satisfy the Statute of Frauds. The writing now relied on is the letter of the 25th February, 1865, found in a satchel in the plaintiff's possession some considerable time after the suit was instituted.

The plaintiff, Colin Henderson Rose, who is the only witness who was called to prove the transaction from his own knowledge, states the transaction thus: that two days before deed A was signed I met him, (meaning his uncle, the deceased Isaac) on the street, he coming up to town. He said he wished to talk about my father. He said to me, "You are aware your father is in difficulties." I said yes. He asked, "What is he going to do?" My uncle then asked if I had any influence with him, and if he would take my advice, and if he had confidence in my uncle. I said I did not know until I saw my father. My uncle then told me what he would advise being done. That the sheriff had then an execution against the store of my father and Nash. He did not think the business a paying one, and would advise it being closed and an assignment made, and there ought to be enough, or nearly enough, to pay the creditors. There may have been further talk. I went to my father: he was very despondent and had not been out of the house for some time. My mother was excited about the sheriff coming in. I asked my father if he had confidence in my uncle. "Isaac," he said, "God help me; if I cannot trust my own brother, whom can I trust?" When I returned to I. N. Rose he called me into a bedroom and told me the conditions on which he would take the property. He said he would pay the Wilson, Cook and Wily mortgages, amounting to about \$5,000, and let my father have \$1,000 in cash. This, he said, would enable him to live one year, and in that time matters would be settled; my father to give him a conveyance of the property, and afterwards.

make an assignment of the store to himself and another—I think Mr. Dardis. He said that at any time Jesse would recoup him in his advances and interest he would reconvey the property,—the interest six per cent. This was at dusk of the evening. Before the deed was made he gave his reasons for doing what he proposed. One was that if the property went to the sheriff it would be sacrificed; that he wished to save the old homestead, did not want to see it brought to the hammer; that he wished to return kindness received from my father; that he owed his appointment as superintendent of the canal to my father, and my father had at one time saved him from bankruptcy; and that he wished to act the part of a brother to my father. Nothing was said about a right to sell, on my uncle's part, village lots.

And on cross-examination:—"I was told my father had borrowed money from the Trust and Loan Company. The mortgages were Wilson's, Cook's, Mrs. Page's or Miss Wily's. I do not recollect that the Trust and Loan Company's mortgage was mentioned. It may have been. The amount was mentioned, \$5,000 or \$5,500. My father was to have \$1,000 in cash, and make a deed. I asked my uncle how he intended to arrange the business. He said any time my father would recoup or repay him at simple interest he would reconvey the property to my father. He spoke of the store and advised an assignment; said there ought to be enough to pay the balance, or nearly enough. I then saw my father. I did not tell him what my uncle said. My uncle thought it better not, for the reason that in the event of trouble about the assignment my father, if he went into the witness box, could say nothing about the land. I did not anticipate any difficulty. I do not know what my uncle expected. My impression was, that if father made an assignment he should assign all he had, and that he was not assigning all, and the idea was that this should appear to be an absolute assignment, when it was not. I said to my father that my uncle would let him have \$1,000 in cash to pay the present mortgages, and you will give

him a deed. I told my mother the circumstances. Isaac asked me if my father had confidence enough in him to trust him. I asked my father if he had confidence in my uncle Isaac. He made the reply I have already stated. I said to my father, "Isaac has made a proposal, stating have you confidence in him to trust your property to him. He gave the answer I have already stated. There were not half a dozen more words said."

In his deposition before the examiners, he repeated the statement nearly in the same words, and adds, "I told him my father was willing to take his advice, and do whatever he would suggest."

And in another portion of his examination he states: "I communicated to my father the real nature of the transaction after Isaac refused to come to a settlement."

This arrangement does not appear to have been communicated to Jesse for some length of time, but the idea intended then to be conveyed to Jesse's mind was, that it was a sale, and he so understood it, although he affects to have understood at first that he was to receive \$6000 over and above the incumbrances, and subsequently was satisfied to receive \$2000 over and above certain specified encumbrances, but at that time nothing but a sale was set up, although there was some difference of opinion as to how the purchase money was to be applied.

Before referring to the correspondence, it is as well to see how the matter was regarded by the neighbours and persons who were in communication with Jesse, from his own statement to them. Austin Doran says, that he was in negotiation with Jesse for a village lot on the property in question, and found that the property was encumbered, and that Jesse then told him, "I have sold and deeded to Isaac, and you can get a good title from him."

This witness also states, that in his opinion all of the west half of lot thirty not sold, could not have been sold for \$5000 in money.

John Allison, who had been in treaty with Jesse some time before 1861, for some lots which he found himself un-

able to pay for, met him shortly after the conveyance to Isaac, and remarked to him: "I suppose my lots are gone." Jesse replied, "I sold to Isaac, but I mentioned it to him." I asked why he sold, he said he was tired of the place and wanted to try his luck some place else. Isaac, on being applied to carry out the sale, hesitated for some time, telling Jesse that he wanted no more of such arrangements, and that he had paid him more for the place than it was worth.

Merkley speaks of a conversation with Jesse, in 1866, when he admitted he had sold the property to Isaac, through his son; that he was to give a certain sum over and above the incumbrances, but that he had never given him a dollar.

In May, 1862, Jesse writes to his brother in reference to a lot he had previously contracted to sell to a Mr. Wildon, intimating that he would pay to him the balance of the purchase money. "It was sold, he says to him, long *before I sold out to you*," this was only a few months after the deed was given.

In a letter to his son in January, 1865, he writes: "What you say about I. N. is as I had understood it previously in substance, though at the time when I signed the deed I thought, or rather understood, I was to have \$6000 in cash, and I. N. to assume all the debts that had a lien by mortgage on the property."

In the following month he wrote, evidently replying to some questions put to him by his son. "However, to make all sure, I will go over the ground again. First, then, I thought when I signed the deed to I. N., I was to have \$6000, and he to take the whole of my real estate, with all the encumbrances, and to pay me that sum for my interest in the same. When I called upon him some days after to get some funds to meet liabilities not secured by mortgage, he then figured up in my presence on the back of a letter he held in his hand, the Trust and Loan mortgage, and your \$400. I then applied to you for an explanation, and what you then stated was in substance the same as you now place it."

"I repeatedly applied to I. N. for my account, but never

got it until he handed it to me just as I was on the wharf at Morrisburgh, about to take the steamer for Quebec. In this account, or rather scrawl on a slip of paper, without date, he includes along with the Trust and Loan Mortgage, &c., your \$400. The chattel property was assigned to him separately, and has been paid for, or mostly so, in what the family lived on from November 1861, to September, 1863, the time we left for Quebec, and amounts to \$889.80. The things I let him have would, if fairly valued, exceed this. * * * His cash account he figures up to \$6,120, and adds, "\$120 more than he agreed to pay."

"Previously to receiving your letter of enquiry, I had written to him (four sheets of large post) of which I kept an exact copy, and in which I distinctly deny: First, that the *sale* was made in any other light than that in which you place it. * * * I have also asked him if he is willing to relinquish the property on receiving his advances."

Again on the 8th of March, after stating that he had nothing favourable from I. N. R., except that he offers to give up the property at cost, he adds: "What I understood you at Chatham, when there the following year, was this: he was to pay me in all \$6,000, and all the liabilities payable out of the property. He was to pay, only charging me with the Trust and Loan claim of \$2,000 against the \$6,000, that in round numbers would be \$4,000, his claim and the Trust and Loan, leaving \$2,000 to pay me in cash. And secondly, that he would release at any time or account to me for the proceeds, he deducting his advances with six per cent. interest."

All these letters point to a sale. All that Jesse apparently then claimed was, that the purchase money was in addition to the encumbrances, and that he was not at liberty to treat them as part of the purchase money, and the right to re-purchase on payment of the advances and interest; and the letter of the 23rd February, which has been so much relied on, is not inconsistent with that state of things. He says, "Your letters all received, and I don't want any more begging letters, pay me my advances as agreed with Colin, and you can have your property."

There is no evidence to shew what letters are here referred to, but we do find two letters which will answer the description, of the 3rd and 17th of the same month.

In the first of these he says, "With regard to the transfer of my Williamsburg property to you in 1861, have to say that I done (*sic*) so entirely under a false impression. You will not have forgotten that the arrangement was made between my son Colin and yourself. What I understood from Colin was this: that you were to take the whole of my real property at Williamsburgh, with all the encumbrances on it, and pay me \$6,000 for my interest in the property, you taking on yourself to discharge all encumbrances. In this it appears I was, as I have said, mistaken, for when I called on you to get the money a few days after the execution of the deed, you figured up a statement on the back of a letter you held in your hand the Trust and Loan mortgage. When I wrote to Colin for an explanation his reply was, "That you took the property at \$6,000, but that it was only to save it from being sacrificed, and that you would account to me for the proceeds, deducting the aforesaid \$6,000 with simple interest thereon. This course, though not what I had understood, was nevertheless satisfactory." He then claims that even on that understanding Isaac is his debtor, and proceeds to criticise the items of the account, which he refers to as having been handed to him when leaving for Quebec.

* * * * *

"I come now to reply to your last letter, of the 13th ult. First, then, you say, 'I have been in financial difficulties ever since I purchased your property.' Now are you willing to relinquish said property on receiving your advances made to me, deducting what the price of lots sold by you, rents, &c. If yes, then I will find some one who will relieve you from that difficulty."

These statements are wholly inconsistent with the case made by the bill, and shew that the transfer was regarded by all parties as a sale, though possibly with an option on the part of Jesse to re-purchase.

There is, however, no confirmation of this to be found in the correspondence. After the receipt of the letter of the 23rd February, in which Isaac intimates that if he repays his advances he can have the property, Jesse writes, in reference to a further advance he was endeavouring to obtain, "It matters not to me whether you call it a loan or gift, for now that you have proposed to give up the property on getting back your advance, I have made up my mind to try and find a man to take it, and so what you advance will only add that much more to your claim."

This is scarcely consistent with the case made by the bill, but is quite in accord with the theory of the defendants, viz., that their ancestor had actually purchased the property, although he was willing, whether under obligations to do so or not, to reconvey upon payment of his advances.

I regret to be under the necessity of arriving at a different conclusion from the learned Vice-Chancellor upon the evidence, but I am relieved to some extent from the circumstance that the statute 36 Vic. ch. 10, O., leaves me no option.

I cannot discover that the plaintiff's evidence is corroborated in any material particular, whilst the evidence and the deceased's conduct all tend to shew that the transaction was a sale, and the letter of the 23rd February is not at all inconsistent with that view. I incline to think that his offer was a mere concession, but putting upon it the construction most favourable to the plaintiffs, it would not carry it beyond admitting a right in the deceased to repurchase.

The plaintiffs now seek to disturb an existing state of things after a lapse of fifteen years, the death of both the principal actors, and after the destruction of documents which might possibly throw much light upon the transaction. Making every allowance for the difficulty in Jesse's way from want of means to carry on the litigation, I am of opinion that it would be most dangerous to allow a deed to be varied upon such evidence as this.

In my judgment the appeal should be allowed, and the bill dismissed with costs.

PATTERSON, J. A.—The bill sets out that Jesse W. Rose, the father of the plaintiff, owned 300 acres of land, being part of the west half of lot 30, in the first concession of Williamsburgh, and lot 34 in the third concession, and also personal property: that he formed the intention of leaving this Province and going into business in the Province of Quebec; and by indenture, dated 12th December, 1861, conveyed the lands to Isaac Newton Rose, and transferred to him a large amount of his personal property, upon the express trust that I. N. Rose would advance to him \$1,000, and hold the property so transferred and conveyed as a security for the repayment of that sum with interest; and would, if necessary, sell and convert the property, or such portion thereof as might be required, in order to pay off and discharge the said debts, and out of the proceeds of such sale would pay and discharge the said debts and hand over, reconvey and retransfer the residue of the said property to the said Jesse W. Rose, his heirs, executors, administrators and assigns. The words “the said debts,” refer only to the loan of \$1,000, and the interest upon that sum. As the bill was originally filed other debts were mentioned, but the reference to them was erased when the bill was amended.

The bill then alleges that Isaac never did in fact advance the sum of \$1,000 as agreed upon, but nevertheless from time to time sold and converted portions of the real estate, and sold or otherwise converted into money the personal property, “alleging that he had made advances, and that, as to the said sale, he applied the proceeds thereof in paying and discharging the said debts of the said Jesse W. Rose.”

These last words have nothing in the amended bill to refer to, as *the said debts*, except the *advances* just spoken of.

This brings us to the end of the fifth paragraph of the bill. The remaining ten paragraphs state that Jesse Rose died intestate in August, 1872: that the plaintiff Colin

Henderson Rose is his administrator: that Isaac Newton Rose died in September, 1874, leaving a will, which is set out, and which, amongst other things, gives to his wife Ruth Rose for life the west half of lot 30, in the 1st concession, with remainder in fee to his son Harry Isaac Newton Rose, subject to a charge of \$1,000 in favor of another son: that the defendants Charles E. Hickey and Ruth Rose, executor and executrix, proved the will: that the trusts upon which the said real and personal property were conveyed and transferred, [being, as we have seen, to secure payment of money which was never advanced] have been fulfilled, and that there remains a large portion of the real estate still unsold, which the plaintiffs submit they are entitled to have re-conveyed to them, subject to the dower of Jesse's widow, who is a defendant. And they ask for an account of Isaac's dealings with the said real and personal property, and that the plaintiffs may petition to redeem the said lands, they offering to pay what (if any thing) still remains due to the estate of the said Isaac Newton Rose.

By their answers the defendants set up a very different state of facts, shewing an absolute sale from Jesse to Isaac, and relying on the Statute of Frauds and the Statutes of Limitations.

The deed of 12th December, 1861, is in evidence. It conveys the 300 acres in fee for the expressed consideration of \$6,000, the receipt whereof is acknowledged, and contains the ordinary limited covenants for title with this clause appended: "It being the intent of these presents that the covenant of warrantee herein contained shall not have reference to the following mortgages made by the party hereto of the first part, viz., to the Trust and Loan Company, Harriet Wylie, and John Wilson."

There is also in evidence a deed dated December 13th, 1861, from Jesse to Isaac, which recites that Jesse is indebted to parties named in Schedule B, and is unable to meet his said liabilities, and is desirous that his said creditors should receive payment of their said claims, respectively, as far as

the assets of the assignor shall pay the same in proportion to the amounts of the said debts due to the said creditors, respectively; and transfers to Isaac the goods, &c., mentioned in Schedule A, for the benefit of all and singular the creditors of the assignor as mentioned in Schedule B, in proportion to the amount of their said debts, respectively. The deed then contains covenants by Isaac to sell, pay debts and expenses, and return surplus, if any, to Jesse. Schedule B shews debts amounting to \$1,537.

As far therefore as the personal property is concerned, there is no pretence that the case made by the bill is in any particular sustained. The deed of 13th December, disproves it.

As to the land, the deed of 12th December, shewing simply an absolute conveyance of the equity of redemption, does not, on its face, support the allegation of a conveyance upon an express trust; or, without placing stress on those words, a conveyance by way of mortgage to secure an advance of \$1000 which the grantee was to make. It does not of course shut out proof that that was the character of the transaction; though, coupled with the fact that possession has accompanied the conveyance, it may make such proof difficult.

The written evidence on which the appellants rely for the purpose of shewing that the deed was only in trust, and enabling them then to give parol evidence of the trust, is contained in three letters, two of them written by Jesse to Isaac on the 3rd and 17th February, 1865, and one by Isaac to Jesse, on the 23rd February, 1865.

In the letter of the 3rd February, Jesse says :

“With regard to the transfer of my Williamsburgh property to you in 1861—I have to say that I done so entirely under a false impression. You will not have forgotten that the *arrangement* was *made* between my son Colin and yourself. What I understood from Colin was this:—That you were to take the whole of my *real* property in Williamsburgh—*with all the incumbrances* on it, and pay me \$6,000 for my interest in the property, you taking on yourself to *discharge all incumbrances*. In this it appears that I was,

as I have said, mistaken, for when I called on you to get money a few days after the execution of the deed, you figured up a statement on the back of the letter you held in your hand the Trust and Loan Mortgage. When I wrote to Colin for an explanation, his reply was:—‘That you took the property at \$6,000, but that it was only to save it from being sacrificed; and that you would account to me for the proceeds, deducting the aforesaid \$6,000 with simple interest thereon.’ This, of course, though not what I had understood, was nevertheless satisfactory. I would just as soon have cut off my right arm as to have deeded away that property for \$6000! This, I think, you were well aware of from the repeated *conversations you since held on the subject*.

“I believed then (and have never changed my opinion) that had what was unsold in the village plot in the map by West, been sold *at the time* or at *any time since*, under the hammer by the sheriff, it would have brought enough to pay *all incumbrances*, together with *every debt* I owed in the world, leaving me the farm back at the G. T. Railway and the 200 acres in the 3rd concession to good. Having above given you my view of the case, I purpose to shew that you are still my *debtor*, even at the \$6,000 which you say was the agreement, but which I do *not for one moment admit* except for the purpose above named.”

Then follows a discussion of items of account, amongst which \$400 loaned by Isaac to Colin Rose, and which Jesse complains of Isaac debiting him, is prominent.

What account Jesse refers to does not appear with certainty; it was probably one of which a copy was found among Isaac’s papers, and was produced. It is dated 16th September, 1863, and reads thus:—

“J. W. Rose, debtor. Amounts paid for you :

Paid W. Wilson	\$2160 00
Cook & Brothers	1110 00
Tom Dardis, 2 notes, \$200 each	400 00
Warlock Note.....	50 00
T. V. Lea.....	2000 00

\$5720 00

Colin 400 00

\$6120 00

\$120 over and above what I agreed to pay. J. P. Wiley’s account, \$889.80.”

Jesse refers also to the charge of \$1,110 on account of Cook & Brothers, and says the original debt was but \$900.

The letter of 17th February acknowledges the receipt of one of the 8th February, which has not been produced, and is occupied in discussing some disputed items, including the \$400 of Colin, which Jesse complains that Isaac has overlooked in his letter. In both the letters of the 8th and 17th Jesse is urging Isaac to let him have some money.

Then comes Isaac's letter of 23rd February, which is very short:

"MY DEAR BROTHER,—Your letters all received, and I don't want any more begging letters. Pay me my advances as agreed with Colin, and you can have your property."

The genuineness of this letter has been a subject of contest, but I understand the learned Vice-Chancellor to have been satisfied with the proof on that point, leaving only the effect of the letter for discussion.

I think the letter may be taken sufficiently to refer to that of 3rd February so as to be read with it. So reading it, we have Jesse saying to Isaac, respecting the arrangement which he reminds Isaac was made between him and Colin, that Colin's account of it was, "That you took the property at \$6,000, but that it was only to save it from being sacrificed; and that you would account to me for the proceeds, deducting the aforesaid \$6,000, with simple interest thereon," and then undertaking to shew that even at \$6,000 Isaac was still his debtor, but distinctly guarding himself from being understood to admit a sale at \$6,000. And then we have Isaac's reply, "Pay me my advances as agreed with Colin, and you can have your property."

The question is, are we to read this as saying, "I agreed with Colin that on payment of my advances you could have your property," or as merely attempting to put an end to Jesse's importunity by saying "Pay me the sum I agreed with Colin to give for the land, and you can have it." In other words, "I will reconvey if you pay me \$6,000," which would be quite consistent with the original sale having been absolute.

To make the expression in the letter clearly read as the plaintiffs require, we must transfer the word *and*, so as to read, "Pay me my advances, and, as agreed with Colin, you can have your property." Reading it as we find it, it is fully as consistent with the defendants' construction as that of the plaintiff.

The defendants reasonably urge that the onus is upon the plaintiffs to displace the *prima facie* effect of the conveyance and the possession by clear and unambiguous written evidence; and they further point with much force to the immediately subsequent correspondence, as either shewing that Jesse himself never understood the letter as admitting an existing agreement to reconvey, or as doing more than making an offer to convey if the money was forthcoming; or as, at all events, going so far in that direction as to leave the meaning at least as ambiguous as ever.

On 24th March, 1865, Jesse writes again for money. He asks for \$56, which he says is due from one Willard, to whom he had sold a lot before making the deed to Isaac, and wants Isaac to add enough to make it \$200; and continues thus: "It matters not to me whether you call it a 'loan' or gift, or what you please, for now that you have proposed to give up the property on getting back your advances, I have made up my mind to buy, and find a man to take it, and so what you advance will only add that much more to your claim," &c.

On the next day he writes another short note asking for anything from \$50 to \$200 to put him in the way of doing something for himself, making no allusion to the land transaction. And on 27th March he writes again, stating that the Rev. L. Taylor, D.D., gives him encouragement that either himself or some other party whom he would find will advance the amount Isaac is out of pocket and take the property, advancing Jesse what will give him a start in the world again.

The next letters are in August 1865. On 21st August, Jesse writes respecting his necessities, and mentions a debt

for \$150, which is pressing. On the 24th, Isaac answers sending \$50 to assist Jesse in his distress, and declining to let him have money to pay debts. This is all we see till the 14th May, 1867, on which date there is another letter from Jesse, in which this passage occurs: "I can only say, that holding, as you appear to do, that the sale was *bonâ fide* at \$6000, there would still be money," mentioning one Vanallan and one Willard, whose names occur in the early correspondence, and from whom he says Isaac received money to which Jesse was entitled.

A letter of the 17th May, 1862, has been referred to on the part of the plaintiff as stating that the sale was absolute. It addressed Isaac as "Dear Sir," and asks him to allow Mr. Wildon \$34 on the purchase of a lot, and contains the expression, "It was sold him long before I sold out to you."

No doubt these words, used in a communication between the brothers, might have great significance; but this letter, being evidently intended for Wildon's eye, must be regarded as stating only what it was intended that he should understand, and cannot fairly be used to strengthen the defendants' case.

I do not overlook the use of the word "advances" in the letter of 23rd February. It is a word usually employed to denote money paid which is to be re-paid; but it does not necessarily mean more than "outlay" or "money out of pocket." I think that is what it means in this letter; and that the meaning conveyed to Jesse—who had been writing about the value of the land as well as about the terms which he asserted, but which he understood Isaac to deny, were those on which the conveyance was made—was to this effect: "Never mind the present value, pay me what I have laid out, or what I agreed with Colin to pay, and you can have it."

I think the correctness of this understanding is shewn by reference to Jesse's letters. In that of 24th March, he says: "Now that you have proposed to give up the property on getting back *your advance*, I have made up my mind to *buy*, and find a man to take it," evidently using "ad-

vance" as meaning "outlay." On 27th March, thinking he is about to find a man to take it, he writes that Dr. Taylor, or some one whom he will find, "will *advance* the amount you are *out of pocket*, and *take the property*, *advancing* me what will give me a start in the world again."

I understand this to mean that an expected purchaser would pay for the land enough to recoup Isaac what he was out of pocket, and in addition give Jesse a start in the world, not that Jesse expected to borrow money to that extent upon the land.

I think what Isaac meant, or at all events what Jesse professed to understand him to mean, was that he would reconvey on being repaid his outlay *without interest*. which was unquestionably no admission of a loan on these terms, "Pay me *my advances*." "Now that you have proposed to give up the property *on getting back your advance*, I have made up my mind to buy, and find a man to take it.

* * I make your advances between \$5,000 and \$6000, after deducting what you have received on it. Now I know the property to be worth about double that sum." "Himself or some party he will find for me, will advance *the amount you are out of pocket*," &c.

In my judgment the written evidence falls short of establishing that the conveyance was not intended to be what on its face it purports to be, viz., an absolute conveyance in consideration of \$6,000.

At law, the grantor would be estopped by his deed from denying that the consideration was fully paid, and would also be bound by his covenant against incumbrances. It was therefore prudent to restrict the covenant from extending to the three mortgages. On the face of the deed it thus appears, that if Jesse was conveying only his equity of redemption for the \$6,000, he had been fully paid that sum. The form of the deed therefore does not affect the present contest one way or the other.

For my own part I think it is well that the force of the Statute of Frauds relieves us from having to consider the oral evidence, because the story told by it does not impress

me strongly in favour of the acting plaintiff, Colin Henderson Rose.

I do not allude to the original frame of the bill, because we have been given to understand that it was drawn from imperfect instructions and filed hurriedly.

I look at it only in its finally amended form, which represents the result of the full information deliberately given by Colin, who is shewn by all the evidence to be the person who knew whatever was known of the transactions in question, and is therefore not dependent, as an heir or a personal representative often is, upon information gleaned as best he can respecting the dealings of his ancestor or testator.

We find him setting out that the lands were conveyed as security for \$1,000 to be advanced, but which sum never was advanced to his father.

Then we have him swearing in his evidence that when his father was in difficulties his uncle Isaac said to Colin that he would pay three mortgages which were upon the lands, amounting to \$5,000, and let Jesse have \$1,000 in cash, which he said would enable him to live one year, and in that time matters would be settled, Jesse to give him a conveyance of the property, and afterwards make an assignment of the store to Isaac and another; and that at any time Jesse would recoup him his advances and interest he would reconvey the property, the interest six per cent.

This is the account of the arrangement upon which we are asked to hold that the deed which was then made by Jesse to Isaac, at the making of which Colin was not present, but which was made in the presence of two witnesses, neither of whom has been called to give testimony, was merely a mortgage.

Colin further tells us that he said to his father that his uncle would let him have \$1,000 in cash to pay the present mortgages [I suppose this is a typographical error for "and pay the present mortgages"], and that his father would give his uncle a deed, and he says he told his mother the circumstances.

This was in December, 1861. If Colin's account is correct one is hardly prepared to find that although the promised advance of \$1,000 never was made, there was not a word of remonstrance from Jesse, nor any appeal to Colin for his statement of the bargain, nor any interference by Colin on behalf of his father, who was all the time in straits for money, and to whom the \$1,000 which was to have been his support for a year would have been no trifling object. What we do hear from Colin is that he first heard, he thinks in 1863 or 1864, that there was a dispute about the land. He does not tell us how he happened to hear of it; but we have in Jesse's letter of 3rd February, 1865, from which I have already given an extract, what is probably a statement of the reference to Colin which informed him of the dispute. This statement is noteworthy in two particulars. It contains Jesse's account of the arrangement, as he says he had understood it from Colin, namely, that Isaac was to pay him \$6,000 and discharge all incumbrances; and Jesse's corrected account of the arrangement, as given by Colin in reply to a letter, namely, that Isaac took the property at \$6,000 to save it from being sacrificed, and would account to Jesse for the proceeds, deducting the \$6,000, with simple interest thereon.

If Colin told Jesse and Jesse's wife at the time of the arrangement what he now tells us the arrangement was, it is incredible that Jesse should have understood from him that he was to get \$6,000 beyond the incumbrances; or to put the same proposition another way, if Jesse understood from Colin that he was to get \$6,000 beyond the incumbrances, it is incredible that Colin could have told him and his wife that the arrangement was what he now says it was.

And when Jesse writes to Colin, the reply which he tells Isaac he received does not state the matter in the way Colin now states it. There is not a hint that any item of \$1,000 cash was to have been advanced to Jesse for his maintenance as part of the \$6,000.

One cannot avoid further noticing that while Jesse puts

forward as what he had understood from Colin to be the arrangement the very transaction imported on the face of the deed, viz., a purchase of the equity of redemption for \$6,000, suggesting the possibility of his understanding having been derived from a search in the registry office, the understanding stated is that the sale was absolute, and not that Isaac was advancing money to be repaid either by money raised by Jesse or by sales made as trustee.

The impression which the evidence leaves on my mind is, that the discrepancies between Colin's testimony now given, and the import of the correspondence, make it impossible to rely on what he says as truly recounting the transactions.

It appears, only too clearly, that for many years, in fact from the time the deed was made until his death, Jesse was in poverty; and often, especially during the last years, in painful distress.

We are not told what were the circumstances of Colin during this time. We do not know that he could, even if so inclined, have assisted his father to assert the rights which he now, on his own behalf, says his father always had. It may, therefore, be unfair to reflect upon him for not having intervened to help his father and the other members of his family in their need; or to draw from the circumstance of his lying by until after the death of both father and uncle, and till he himself was the only surviving witness of the events in question, any inference against the honesty of his claim. But the delay, whatever caused it, has been unfortunate for him if his claim is honest. The witnesses who might have corroborated him have passed away, one of them, the uncle, having devised the land as the portion of one of his sons, who will be put in a less favorable position than Isaac's other children if it is taken from him; and the plaintiff's own evidence does not receive the support which activity on his part in the earlier years of the dispute would have lent to it.

I think the appeal should be allowed, with costs, and the plaintiffs' bill dismissed, with costs.

BLAKE, V. C.—I have read over the evidence in this case several times since the argument, and on each occasion I arrived at the same conclusion as I formed on the hearing of the cause. I then thought that, looking at the delay from 1861 to 1876, the death meantime of the most important witnesses to the transaction impeached, the value of the property the subject matter of the agreement at the time it was made, the want of distinctness in the evidence, and the change of circumstances, it was a case in which the Court should have refused the plaintiffs the relief they ask. The Judge who tried the cause no doubt had all these considerations before his mind. They are matters of everyday occurrence, and form items in the conclusions at which the Court of first instance arrives in very many of the cases as to which adjudication is demanded.

I cannot take for granted that the Vice-Chancellor did not duly weigh these elements in forming one's judgment, to which attention is so frequently called. I think there is no doubt that verbal testimony is admissible. An exhibit is produced in the handwriting of Isaac N. Rose, dated "Morrisburgh, September 16, 1863," which is headed "J.W. Rose, debtor. Amounts paid for you," and then follow the items which, it is alleged, form the purchase money of the premises in question. According to the present contest J. W. Rose was not the debtor of Isaac Rose, in this matter. In 1861, these debts were assumed, and then discharged so far as J. W. R. is concerned by the conveyance impeached, according to the contest of the defendants. If that be so, how comes it, that in September, 1863, I. N. R. makes a memorandum which negatives this position and shews that the transaction was not one of the conveyance of these lands, and, as a consideration, the assumption of these debts, but that notwithstanding the fact of the conveyance, the debt caused by the payment of these amounts by I. N. R., still remained to be paid to him by J. W. R.? I refer to this exhibit first, as it is prior in point of time; but the most important exhibit, and one which the defendants failed to impeach, is exhibit B.

"MORRISBURGH, February 23rd, 1865.

"MY DEAR BROTHER,—Your letters all received, and I don't want any more begging letters ; pay me my advances as agreed with Colin, and you can have your property.

"Yours truly, ISAAC ROSE."

Colin was the person who acted between I. and J. W. R., his uncle, and his father. He had not interfered between 1861 and 1865. This was the only dealing of the kind between the two brothers. "My advances" could only refer to those which formed, as it is now alleged, the consideration for the conveyance, and the words, "as agreed," can only refer to the transaction of 1861, which was the only occasion on which Colin made an arrangement between those two parties, so that in 1863 Isaac speaks of this transaction not as being a sale and purchase, but as being a case in which "advances" were made by Isaac "as agreed."

Then, further on, Isaac speaks of the property in question in referring to J. W. R. as "your property." These two documents furnish, within the authorities, ample ground for the admission of verbal testimony: *Lincoln v. Wright*, 4 DeG. & J. 22; *Haigh v. Kaye*, L. R. 7 Ch. 469; *Booth v. Turle*, L. R. 16 Eq. 182; *Cripps v. Gee*, 4 Bro. C. C. 1; *McCormick v. Grogan*, L. R. 4 E. & I. App. 82; *Ross v. Scott*, 22 Gr. 29.

There is much to lead to the conclusion that in 1861, as J. W. R. was in difficulty, it was determined between Isaac N. and Colin, J. W. R.'s son, that the property of J. W. R. should be conveyed to Isaac, who was to hold the same, pay the debts, advance J. W. R. \$1,000, and reconvey when the amount paid was refunded. The defendants do not set up that the transaction is one that can be impeached as intended to defeat or delay the creditors. The exhibits to which I have referred, and the evidence of Colin, support this view. Although the perusal of the evidence does not lead me to conclude that it would be proper to give such credence to it as to warrant a decree in favour of the plaintiffs, yet I cannot consistently with the reasonable rule laid down in this Court in *Sanderson*

v. *Burdett*, 18 Gr. 417, and *Orr v. Orr*, 21 Gr. 397, and other cases, set my opinion on this question of evidence against the judgment of the learned Judge, who has been placed in a position so much more advantageous for determining the weight to be attached to the evidence adduced in favour of and against the contention of the plaintiffs.

I think the appeal should be dismissed, with costs.

*Appeal allowed.**

HOWE V. THE HAMILTON AND NORTH-WESTERN RAILWAY.
COMPANY.

R. W. Co.—Collision at crossing—Proof of negligence—R. S. O. ch. 165, sec. 21.

The defendants were empowered by the corporation of the city of Hamilton to run their railway along Ferguson Avenue in that city. The plaintiff, who was driving along Barton street, which crosses Ferguson Avenue on a level, found a freight train across the street facing southward, and stopped his horse about 150 feet from it. Presently a pilot engine came down to the head of the train to assist it up the grade to the south, but immediately upon its arrival it was found that firewood was required for its use, and the train at once moved to the north to allow the pilot engine to go to the woodshed, which was situated to the north of Barton street. The train had moved only to the other side of Barton street, about 15 or 20 feet, when the plaintiff attempted to cross, but the horse shied at the pilot engine, which had remained stationary, and the plaintiff was thrown out and injured.

Held, reversing the judgment of the Queen's Bench, that there was no evidence of negligence which should have been submitted to the jury, and a nonsuit was ordered.

Held, also, that under R. S. O., ch. 165, sec. 21, the corporation of the city of Hamilton had clearly power to allow the defendants to run their railway along Ferguson Avenue.

APPEAL from a judgment of the Queen's Bench refusing a rule *nisi* to set aside a verdict for the plaintiff, and enter a nonsuit or verdict for the defendants. The pleadings and facts are stated in the judgments on this appeal.

* This case has been carried to the Supreme Court, and stands for judgment.

The case was argued on the 15th November, 1878 (a.)

C. Robinson, Q.C. (Walker with him), for the appellants. There was no evidence, or at all events no sufficient evidence, of the negligence of the defendants alleged either in the first, second, or fourth counts proper to be left to the jury. It is clear that the pilot-engine caused the accident, and it is equally clear that no negligence was shewn on defendants' part in the management of it. It came down from the south to assist the train up the grade, when it was found that it required more fuel. The freight train then at once backed to the north to enable the pilot-engine to get to the wood-shed, and as soon as it had moved far enough to clear Barton street fifteen or twenty feet, the plaintiff immediately attempted to cross, without giving time for the pilot-engine to move. It was stationary, making no noise whatever, and had it attempted to move the damage would clearly have been increased. It cannot be pretended that it had been there an unreasonable time, and the plaintiff gave it no time to get further away, as he should have done, before attempting to cross. It is impossible on this evidence to point to any negligent act or omission on defendants' part which led to the accident. The plaintiff was guilty of such contributory negligence as prevents him from recovering on those three counts. There is no evidence to sustain the third count, and the case was not left to the jury upon it. The jury were guilty of misconduct in arriving at the amount of the verdict. The sum awarded as damages is the result of the different amounts awarded by each juror, with a thirteenth sum added, divided by twelve, and is not the unanimous verdict of the jury. They cited *Metropolitan R. W. Co. v. Jackson*, L. R. 3 App. Cas. 193; *Siner v. Great Western R. W. Co.*, L. R. 3 Ex. 150, 153, 154; 155, L. R. 4 Ex. 117; *Adams v. Lancashire and Yorkshire R. W. Co.*, L. R. 4 C. P. 739; *Wyatt v. Great Western R. W. Co.*, 6 B. & S. 709; *Skelton v. London and North-Western R. W. Co.*, L. R. 2 C. P. 631; *Winckler v. Great*

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Western R. W. Co., 18 C. P. 250; *Anderson v. Northern R. W. Co.*, 25 C. P., 301; *Cliff v. Midland R. Co.*, L. R. 5 Q. B. 264; *Stott v. Grand Trunk R. W. Co.*, 24 C. P. 347; *Manchester, &c., R. W. Co. v. Fullarton*, 14 C. B. N. S. 54; *Hodges on Railways*, 6th ed., 355-360; *Redfield on Railways*, vol. 1, 541, 543, 549; *R. & J.'s Digest*, 3149, 3167.

Osler, Q.C. (*Teetzel* with him), for the respondent. The jury found, and the evidence shews, that the appellants were guilty of negligence and an unreasonable user of their track crossing Barton street, in allowing their pilot engine to stand on the street in the manner shewn by the respondent's evidence. It is also clear that the leaving of the pilot engine on the street by the appellants was the proximate cause of the respondent's injury, and that the respondent at the time of the accident was lawfully using the street. The appellants therefore cannot avoid their liability: *Harris v. Mobbs*, L. R. 3 Ex. Div. 268. The respondent submits that by the evidence under the second and fourth counts of his declaration, the appellants are shewn to be wrongdoers in so leaving their pilot engine on the street, and therefore even contributory negligence or want of skill would be no defence to these two counts; *Ridley v. Lamb*, 10 U. C. R. 354; *Brown v. Great Western R. W. Co.*, 2 App. R. 64; *Shearman & Redfield on Negligence*, 3rd ed., pp. 437 to 442, 581. But the evidence does not shew that he was guilty of negligence or want of skill. The mere fact of the horse, which had been used by the respondent for several weeks and had always been found gentle, becoming unmanageable from fright at the pilot engine, would not prevent the respondent from recovering under the first count of his declaration, unless he had been guilty of want of reasonable care or skill, which was a question for the jury, and which was directly answered by them in his favour: *Sherwood v. Corporation of the City of Hamilton*, 37 U. C. R. 410; *Bridges v. The London and North-Western R. W. Co.*, L. R. 7 H. L. 213. The jury were not guilty of misconduct in the means they adopted to arrive at their verdict; it is immaterial by

what means they fix upon a certain sum, as long as such sum was unanimously agreed upon by them as the proper amount of their verdict: *Burgess v. Langley*, 5 M. & G. 722, 6 Scott N. R. 518; *Crabtree v. The State*, 3 Sneed 302; *Birchard v. Booth*, 4 Wis. 67; *Dana v. Tucker*, 4 Johns. 487; *Guard v. Risk*, 11 Ind. 156; *Grinnell v. Phillips*, 1 Mass. 531.

6th December, 1878. (a) BURTON, J.A.—This is an appeal from a judgment of the Court of Queen's Bench, refusing a rule *nisi* to set aside the verdict, and to direct either a verdict for the defendants or a nonsuit: and this Court having come to the conclusion that a rule *nisi* should have been granted, the case proceeded as on an argument to make that rule absolute, and cause was shewn in the first instance in accordance with the practice in such appeals: *Kingsford v. Merry*, 1 H. & N. 510.

The cause was tried before Mr. Justice Gwynne and a jury, and a verdict found for the plaintiff for an amount which is not excessive if he is entitled to recover at all for the injuries sustained.

The first count charges that the defendants, who, were possessed of a railway which crosses a street in the city of Hamilton on a level, wrongfully and improperly left a locomotive standing upon a road at or near the crossing; that the plaintiff was travelling along the road, had occasion to pass, and was desirous of passing the railway at this point, and whilst crossing upon the road the horse, by reason of the defendants so negligently and improperly leaving the said locomotive upon the road, took fright and became unmanageable, whereby the plaintiff was thrown from his carriage and injured.

The second count sets out a by-law of the corporation of the city of Hamilton, professing to regulate the movements of trains within the limits of the city, and charges that the defendants, in violation of the regulations of the by-law, negligently and improperly left standing upon the public

(a) *Present*.—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

road for a longer period than authorized by the by-law a locomotive engine, and that the plaintiff having occasion to use the road in a carriage drawn by a horse, the horse, by reason of the locomotive being so negligently left, took fright, whereby the plaintiff was thrown out and injured.

The third count was not attempted to be proved, and merely claims damages for delays alleged to have been sustained by the plaintiff from time to time in going to and from his place of business. If proved, it would, I apprehend, not constitute a cause of action entitling the plaintiff to recover : *Caledonia R. W. Co. v. Ogilvy*, 2 Mac. H. L. Cas. 229.

And the fourth count is general, for unlawfully leaving a locomotive on a public highway, so as to make it dangerous for the ordinary purposes of traffic.

The issues raised upon the first and second counts appear to me to be substantially the same, as no action would be sustainable for a mere violation of a municipal regulation, unless the facts alleged and proved establish such a lack of care and diligence as the law demands : in other words, in order to sustain either count, it would be necessary to prove that there has been, in the act or omission complained of, a violation on the part of these defendants of some common law duty or statutory obligation which has caused an injury to the plaintiff.

It was shewn that the defendants' railway was, by leave of the corporation of the city of Hamilron, carried along a highway known as Ferguson Avenue, which intersects Barton street, the road upon which the plaintiff was travelling, and it was contended by the plaintiff's counsel that the corporation had no power to grant such permission, and that the defendants were consequently wrongdoers, and guilty of a nuisance in laying the rails of their road upon the public street ; and it may well be, if that position be correct, that the case would fall within that cited of *Harris v. Mobbs*, reported in L. R. 3 Ex. Div. 268, and an action might be sustained on the fourth count.

In the case referred to there, the defendants having left a

house van attached to a steam plough on the side of the highway, in itself an unauthorized and dangerous act in derogation of the public rights, and the jury having found that it was left there unreasonably and negligently, and caused danger to persons passing along the metalled part of the road, Mr. Justice Denman decided that judgment should be entered for the plaintiff, for the *unauthorized*, unreasonable, and dangerous use of the highway in that case was the proximate cause of the injury. But there is no pretence for restricting the operation of the clause of the Railway Act, section 21 of the Revised Statutes of Ontario, 165, to township municipalities. Cities, towns and villages have, ever since the passing of the Railway Act, been in the habit of granting such permission to railway companies, and although their by-laws have frequently been questioned on various grounds, no one has, I believe, hitherto doubted the power of the city or town to grant the permission. The term highway by the interpretation clause of the Act is declared to mean all public roads, streets, lanes, and public ways and communications; and the only municipal authority that can deal with a street within a city, is the council of the city.

There is no reason therefore to doubt that the railway company had full power and authority to use the street for the purposes of their railway. Parliament has merely imposed the necessity of its obtaining the permission of the municipality within which the highway is situate, and that corporation, even if it had the power to do so, has not in fact imposed any conditions. It must of course be assumed that in such a grant it is implied that the company are to work the railway in a reasonable and proper manner, and the greater the thoroughfare the greater the care and skill that should be exercised in order to avoid accidents. As said in an English case, "Whatever the degree of traffic may be, be it more or less, a corresponding degree of care is required on the part of the company," *Per* Lush, J., in *Cliff v. Midland R. W. Co.*, L. R. 5 Q. B. 266. And they are bound so to use the privilege as not unnecessarily or un-

reasonably to interfere with those who have also a right to use the highway, and not to leave their locomotives or cars, when not in use for the actual working of the railway, upon the highway; but the Legislature having authorized the company to construct their railway upon the public streets without imposing upon them any express restrictions or requiring any precautions against danger, must be held to have intended that persons who have to use the streets so used and crossed, should take the risk incident to that state of things, and we must be careful not to render the privilege accorded to them by the Legislature valueless by imposing upon them liabilities which it was not intended they should bear.

The complaint here is, not that the company has exhibited any want of care or skill in the running of its trains, or in the management of its locomotives, as by blowing off steam and thereby frightening the plaintiff's horse, but by negligently and improperly leaving a locomotive upon the street when not in use; and the question is really whether there was any evidence of this which ought to have been submitted to the jury.

Upon the plaintiff's own evidence it appears that upon the day of the accident he and one Grace left Sawyer's works, a short distance from the scene of the accident, and on arriving upon Barton street discovered that there was a freight train on Ferguson Avenue, across that street, heading towards the mountain—in other words, facing south. Whilst waiting for that train to move, the pilot-engine came down (as he supposed, and as was the fact) for the purpose of coupling on and helping the train up grade. He states that it came down close to the other engine, and appeared to make a motion to couple, and after remaining a short time in that position the engine and train he first saw backed down a little—that is to say, went north.

This is explained by the witnesses for the defence, who shew that the train was due to leave: that the pilot-engine had come down, as spoken of, to assist the train, when the engineer of the pilot-engine said he required

wood: that in consequence the other train moved north to enable the pilot-engine to go to the wood shed: that upon its so moving, and when it had moved fifteen or twenty feet, the plaintiff, as he expresses himself, undertook to cross, and that it was when he thus undertook to cross, "the horse shied at the detached locomotive standing in the street." The undisputed fact therefore is, that the locomotive, the presence of which is alleged to have caused the accident, came down the line in the legitimate, proper and ordinary course of the company's business, to aid the freight train then about leaving: that finding themselves short of wood the driver mentioned that circumstance to the party in charge of the other train: that he accordingly made way in order to enable the pilot-engine to go to the wood shed, and before his engine had gone fifteen or twenty feet the plaintiff undertook to cross. The pilot-engine was therefore stationary on the road for the interval of time between its arrival in front of the other train and attempting to couple, and the time when that train moved and the plaintiff undertook to pass. What possible evidence can that furnish in support of the allegation in this declaration? The engineer in charge of the pilot had it in view to follow the other train on the way to the wood shed as soon as he could safely do so. He would probably have done so but for the plaintiff's driving past, which rendered it necessary for him to defer action.

But it is said he should have gone south, because, as alleged by some witnesses (although there is upon that point conflicting evidence), his engine over lapped the sidewalk; but this contention appears to me to be wholly untenable. Had he unnecessarily gone south, and an accident had resulted either from his frightening some other horse or interfering with some other cross street, and thereby in some way causing injury, there might have been real ground for making the company answerable in damages. He remained for an almost inappreciable space of time in the position he was in, when, in the legitimate exercise of the powers of the company he joined the other train, and

was prevented moving forward either from fear of collision with that train by following too immediately upon it or from a desire not to injure the plaintiff. I attach not the slightest importance to whether, under this state of facts, the engine overlapped the Barton street sidewalk, or was wholly to the south of Barton street. It is not a matter which can in the remotest degree affect the liability of the defendants.

It appears to me that upon the plaintiff's own evidence the pilot-engine, which alone is said to have caused the accident, was legitimately upon the road in the ordinary course of the company's business, and that the company were in that respect availing themselves of their privilege in a reasonable and proper manner, and were working their railway as railways are usually worked. If it be admitted as it must be admitted, that up to the time the train moved north the pilot-engine was rightfully on the highway, what occurred subsequently which could in fairness be submitted to the jury as evidence of negligence?

The plaintiff appears to have crossed almost immediately after the train moved north. Had the party in charge of the pilot-engine attempted at that time to go south, and had an accident occurred, the company would have been charged with negligence, and as it appears to me with much greater reason, had an accident occurred to the plaintiff from the movement or whistling of the engine at that time.

In *Cotton v. Wood*, 8 C. B. N. S. 568, Erle, C. J., said : to warrant a case being left to a jury it is not enough that there may be some evidence of negligence ; a mere scintilla of evidence is not sufficient, but there must be proof of well defined negligence. And in *Giblin v. McMullen*, L. R. 2 P. C. 317, confirming the case of *Ryder v. Wombwell*, L. R. 4 Ex. 32, it was held that in every case before the evidence is left to the jury there is this preliminary question for the Judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for

the party producing it, upon whom the onus of proof is imposed.

It was considered that the authority of these cases was much weakened by the decision in *Bridges v. The North London R. W. Co.*, L. R. 7 H. L. 213, but the misapprehension which existed in reference to that case is commented upon and corrected in the case of the *Metropolitan R. W. Co. v. Jackson*, in the House of Lords, L. R. 3 App. 193.

In the Court of Appeal, L. R. 2 C. P. D., Lord Justice Amphlett, in intimating his view of *Bridges's Case*, states at p. 127: "It is now settled by that case, (though previously doubted by many eminent Judges,) that the question whether, in cases of this sort, negligence can be inferred from a given state of facts, is itself a question of fact for the jury, and not a question of law for the Court or the presiding Judge." And the Lord Chief Justice at the conclusion of his judgment, L. R. 2 C. P. D., says, at p. 45: "All that remains is to consider whether it was reasonably competent to the jury, if they thought that negligence was proved, to connect the accident to the plaintiff with that negligence as its cause, or as materially contributing thereto. I cannot doubt, especially after the decision of the House of Lords (in *Bridges v. The North London R. W. Co.*) that this was a matter of which the jury were the proper judges, and which it was incumbent on the presiding Judge to leave to their decision."

But the Lord Chancellor, in delivering the judgment of the House of Lords, takes occasion to say that he cannot look upon the case of *Bridges* as establishing either of those propositions, and that it was impossible to lay down any other rule than this; that from any given state of facts the Judge must say whether negligence *may* be reasonably and legitimately inferred, the jurors have to say whether from those facts, when submitted to them, negligence *ought* to be inferred.

Even assuming that there was an unreasonable delay in keeping the first train and cars across the street, which I think is not borne out by the evidence, it is sufficient to

say that it was in no way connected with the accident, and as regards the pilot-engine, which is said to have caused the accident, there was no evidence of any neglect of duty which was, under the circumstances, cast upon these defendants, but that what happened was a pure accident for which these defendants are not responsible.

I have forbore to express any opinion upon the branch of the case which treats of the contributory negligence of the plaintiff, because I think there is no negligence brought home to the defendants, and because, whatever might be my own view, there was probably evidence upon that point which was properly referable to the jury, and with whose functions the Court ought not therefore to interfere; but I think there is strong reason to believe that the divided responsibility of the plaintiff and Grace in driving the horse probably caused the accident.

We must all sympathize with the plaintiff in the very serious injury he has sustained, and if there was any evidence which would at all have warranted the jury in finding as they have done, we should, in declining to interfere, be giving a judgment more in accordance with our feelings than is that we are now giving.

I am, however, so strongly of opinion that the evidence wholly failed to shew any failure of duty towards the plaintiff on the part of these defendants, that I am clear that a rule *nisi* ought to have been granted by the Queen's Bench, and that it is now our duty to make that rule absolute.

The appeal therefore, in my opinion, should be allowed with costs, and a nonsuit entered, which involves the payment of the costs below.

Moss, C. J. A.—The difficulty which the plaintiff has to encounter is that of pointing to any evidence that the unfortunate accident, from which he has suffered so severely, was attributable to any negligence for which the defendants are responsible.

Assuming that under its Act of Incorporation, and the

by-law of the city of Hamilton, the company obtained power to use Ferguson Avenue for the purpose of their railway, there was no wrong of which the plaintiff could complain in there being a train stretched across that avenue when he arrived on Barton street.

There is no reason to suppose it was placed there otherwise than in the ordinary and proper prosecution of the company's business. If it had been allowed to remain there an unreasonable time, the company might have been guilty of an unlawful obstruction of the highway, but such conduct would not have caused or contributed to the accident. Whilst this train was still stationary, and the plaintiff was still sitting in his vehicle at a distance of 150 feet from the avenue, a pilot-engine came down to the head of the train for the purpose of assisting to pull it up the steep grade. The plaintiff understood that this was the object with which the pilot-engine was brought, and he no doubt expected that the train would proceed southwards. But immediately upon the arrival of the pilot-engine, and before it was coupled to the train, it was discovered that more firewood would be required for its use. To obtain a fresh supply it was necessary for the pilot-engine to proceed to the wood house, which stood to the northward, so that the train intervened. Accordingly the train was backed down toward the north, the intention being that the pilot-engine which was thus left standing across or partly across the sidewalk of Barton street, should follow it and proceed to the woodshed. Up to this point I cannot discover the slightest trace of negligence of which the plaintiff is entitled to complain as the proximate cause of the injuries he has sustained. On the contrary, everything appears to have been done in the ordinary course of business, and with reasonable diligence.

It was indeed suggested, rather than argued, that there was negligence in the pilot engine being unprovided with a sufficient supply of fuel. But there is nothing to shew that this arose from any want of reasonable care and attention on the part of the company's servants, and the

conclusive answer to the observation is, that at any rate the accident was not caused by this circumstance. Nor was there any evidence that the pilot engine waited for an unreasonable time before proceeding towards the wood shed.

The train had gone no further than the other side of Barton street when the plaintiff drove on his horse. It was highly reasonable that that distance at least should be allowed to intervene before the pilot engine commenced to move, otherwise there would have been danger of a collision between it and the train. The plaintiff did not give it the opportunity of following the train after the latter had reached the other side of the road, for he himself describes what he did in these words: "When the engine of the freight train backed down clear of the street I undertook to cross."

It appears also from the evidence adduced by the plaintiff that as soon as the plaintiff started the horse became restive and began to shy. If the pilot-engine had been moved after the horse had started, the danger of an accident would obviously have been increased, for if the horse felt such great alarm at the sight of an engine when standing still, it can scarcely be doubted that he would have been still more frightened if it had crossed Barton street while he was coming up.

It is in my view quite immaterial whether the tender of the engine reached across the whole width of the sidewalk, for whatever its position it had come there lawfully, and had not remained for an unreasonable time.

It was so obvious that the pilot-engine could not have been expected to commence to move after the train before the plaintiff had taken upon himself to attempt to cross, that resort was had to the contention that the engine should have been moved up the track in the opposite direction, so as to leave the sidewalk free. I think that this argument is without foundation.

It was the duty of the driver of that engine to adopt the ordinary and reasonable course of following the train with reasonable diligence. The time for the departure of

the train had already passed, and it was of consequence that the wood should be got promptly.

In answer to a question put by the learned Judge as to whether the pilot-engine stood upon Barton street for an unreasonable period, having regard to the reasonable use by the defendants of their track crossing the street, the jury said: "For an unreasonable time, there being no obstruction."

I have already intimated that in my opinion there is no evidence to warrant that finding; but, on the contrary, it was there scarcely an instant before the train moved. But even if it were there for an unreasonable time, I am unable to perceive how that caused the accident. There is nothing in the evidence, I think, to shew that the company were not using their railway with that attention to the rights and the safety of the Queen's subjects, which under the circumstances they were bound to exercise. If such want of attention had been shewn, such cases as *Manchester, &c., R. W. Co. v. Fullarton*, 14 C. B. N. S. 55, and *Stott v. Great Western R. W. Co.*, 24 C. P. 347, establish that the defendants would have been liable.

In these cases the negligence consisted in the improper and unreasonable blowing off of steam, by which the plaintiffs' horses were frightened. The principle of these cases is inapplicable to the present case.

This case is also clearly distinguishable from *Harris v. Mobbs*, L. R. 3 Ex. Div. 268, on the ground that (as I have hitherto assumed) these defendants had lawful authority to use the road and to bring their pilot-engine to the spot where it stood, while in that case the unreasonable and dangerous use of the highway, by leaving on it a van and steam plough, was wholly unauthorized.

With the view of bringing this case within the principle of that decision, it was argued that the corporation of Hamilton could not give the requisite authority to the company to run their trains through the streets, but that the power to grant such permission belongs to the township municipality. I think that this contention is as un-

founded as it is novel. The manifest intention of the Legislature was to vest the right to grant this permission in the municipal authority which possesses general jurisdiction over the particular highway.

I think our order should be to allow the appeal with costs, and order a nonsuit to be entered in the Court below.

PATTERSON and MORRISON, JJ.A., concurred.

Appeal allowed.

Aff. 8 SCR 474.

MILLOY V. KERR ET AL.

Warehouse receipts—34 Vic. ch. 5 D.—Trove—Right of property—Fraudulent preference.

At the request of the Consolidated Bank, to whom the Canada Car Company owed a large sum of money, the plaintiff consented to act as warehouseman to the Company for the purpose of storing certain car wheels and pig iron, so that they could obtain warehouse receipts upon which to raise money. The company granted him a lease for a year of a portion of their premises, upon which the wheels and iron were situate, in consideration of \$5. The Consolidated Bank then gave him a written guarantee that the goods should be forthcoming whenever required, and he thereupon issued a warehouse receipt to the company for the property, which they endorsed to the Standard Bank and obtained an advance thereon, which they paid to the Consolidated Bank.

Shortly afterwards, an attachment in insolvency issued against the company, and the defendants as their assignees in insolvency, took possession of the goods covered by the receipt.

It appeared that the plaintiff was a warehouseman carrying on business in another part of the city: that he only acquired the lease for the purpose of giving warehouse receipts to enable the company to obtain an advance from the Consolidated Bank; and that he had not seen the property himself, but had merely sent his foreman to examine it before giving the receipt. The plaintiff being sued in trespass and trover:

Held, affirming the judgment of the Queen's Bench 43 U. C. R. 78, that he was not entitled to recover: that he had neither possession of nor property in the goods in question; and that he was not a warehouseman of the goods within the meaning of 34 Vic. ch. 5 D.

Quære, if the receipt had been valid, as given by a warehouseman in the ordinary course of business, whether the transaction, as set out in the evidence, could be considered as fraudulent within the Insolvent Act.

Seemle, that to sustain this view certain inferences of fact must be drawn, which had not been found at the trial.

Quære, also, whether, under the facts more fully set out in the report, the two banks were so identified that the transaction must be regarded as an attempt to secure an antecedent debt from the Consolidated Bank by means of a warehouse receipt.

THIS was an appeal from a judgment of the Queen's Bench making absolute a rule *nisi* to set aside a verdict for the plaintiff, reported 43 U. C. R. 78. The pleadings and facts are stated there, and in the judgments on this appeal.

The case was argued on the 21st May, 1878. (*a*)

M. C. Cameron, Q. C., and *Kerr*, Q. C., for the appellant. When the appellant granted the warehouse receipt in question, he was entitled to hold the property against all the world, except the holders of the warehouse receipt, in order that he might answer the warehouse receipt when presented; and he was not affected by any negotiations whatever between the Consolidated and Standard Banks. If the Standard Bank was not entitled to claim on the warehouse receipt given by the plaintiff, because of some dealings between the Consolidated Bank and the Car Wheel Company, affected by the insolvency laws, the proper course for the defendants was to have compelled the Standard Bank to give up the warehouse receipt, and thus release the plaintiff from his liability thereon; but they could not legally take the goods out of the hands of the plaintiff while he was liable on the warehouse receipt given by him, and had no knowledge or notice of the infirmity of the title of the holder of the receipt, if there was really any such infirmity. At the time the goods were taken from the plaintiff, and this suit was commenced, the plaintiff was entitled to retain the goods, and to refuse to deliver them until he had been notified, and satisfactory evidence given him, by the production of the deposit receipt or otherwise, that he was safe in giving them up. The Standard Bank, then and now the holders of the warehouse receipt, advanced money and discounted notes on the security of the warehouse receipt, and are entitled to receive back the money and to realize on the security placed in their hands when the notes were discounted.

(*a*) *Present*.—MOSS, C. J. A., BURTON, PATTERSON, and MORRISON, JJ. A.

The Standard Bank did not become the creditors of the Consolidated Bank, nor were they in any way trustees for the Consolidated Bank. The former bank advanced money which had not been repaid; and even if the payment of these moneys by the Car Wheel Company to the Consolidated Bank was a preferential payment within the meaning of the insolvency laws, it does not follow that the bank or the person from whom the money was borrowed should not be paid the money borrowed, or that the security on which the loan was granted should be forfeited. Even if the Standard Bank held the collateral promise of the Consolidated Bank to indemnify them when they loaned the money, they were not precluded because they held such collateral undertaking from realizing on the security on which they had primarily relied when they lent the money. This action is not against the Consolidated Bank, nor is the Consolidated Bank a party to this suit. It does not follow because the Consolidated Bank might be made to refund the money it had received in payment of its debts, that the Standard Bank, or the plaintiff, and not the assignee, should be compelled to bring the action and compel the repayment of the money by the Consolidated Bank. Neither the Standard Bank nor the Consolidated Bank being parties to this suit, any judgment given herein is no answer to a suit brought by the Standard Bank for the value of the goods, nor can it be set up as a defence that the Standard Bank should seek their remedy for the money paid by them against the Consolidated Bank. If there were any acts which would be void or voidable in insolvency, the plaintiff is not shewn to have been in any way connected with or aware of them. But there is no evidence that the transactions between the two banks were such as would be void in insolvency as respects the Standard Bank, either because the Standard Bank was aware of the insolvency of the Car Wheel Company, or because the Standard Bank knew that a preference contrary to the insolvent laws was being intended, or that the Standard Bank was lending itself to any violation of the

insolvency laws. If the payment to the Consolidated Bank was preferential, the true remedy for the defendants was to compel the Consolidated Bank to repay the money, and not to take from the plaintiff the property on the security of which the money had been procured from the Standard Bank by the Car Wheel Company. Although the Standard Bank knew that the Car Wheel Company intended to use the money to give a preference to one creditor, it does not follow that the loan and security given for it should be void. The money advanced on the security of the warehouse receipts was the money of the Standard Bank, for the recovery of which they have no legal claim against the Consolidated Bank; and as they would not have lent the money to the Car Wheel Company without the security of the warehouse receipts, they ought not now to be compelled to abandon any security they had taken, nor ought the property to be taken from the custody of the plaintiff in their absence, and their security thus destroyed. The lease to the plaintiff was valid, and the plaintiff was in possession of the goods in question upon the premises by the lease demised to the plaintiff; the defendants had notice of the plaintiff's possession thereof, and they were not entitled to enter upon the premises and to take the goods out of the possession of the plaintiff, without first establishing their right to the same, or without avoiding the lease to the plaintiff, and the transactions under which the plaintiff acquired and held such possession. The Car Wheel Company being incorporated under 37 Vic. ch. 35, O., is not liable to the provisions of the Insolvent Act, and the defendants were therefore trespassers, inasmuch as the Insolvent Act applies only to companies incorporated under the authority of the Dominion Parliament. They cited the following authorities: *Royal Canadian Bank v. Ross*, 40 U. C. R. 466; *Burke v. McWhirter*, 33 U. C. R. 1; *Watson v. Henderson*, 25 C. P. 562; *L'Union St. Jacques Montreal v. Dame Julia Belisle*, L. R. 6 P. C. 31; *Re Coleman*, 36 U. C. R. 559; *Phillips v. Bateman*, 16 East 372; *Mathers v. Lynch*, 27

U. C. R. 244; *Eaton v. Shannon*, 17 C. P. 596; *Bauerman v. Radenius*, 7 T. R. 667; *Browne's Actions at Law*, 90; *Smith's L. C.*, 6th ed., vol. II, 362; 34 Vic. ch. 5, secs. 46-47, D.

C. Robinson, Q. C., (with him *Geo. Kerr, Jr.*) for the respondents. The defendants being assignees in insolvency, and in possession of the property in question before this action, the plaintiff's proper and only remedy is to proceed under the provisions of section 125 of the Insolvent Act of 1875, and not by suit: *Crombie v. Jackson*, 34 U. C. R. 575; *Dumble v. White*, 32 U. C. R. 601; *Archibald v. Haldan*, 30 U. C. R. 30; *Munroe v. Commercial Building Society*, 36 U. C. R. 464. It is clear that the plaintiff was not the warehouseman of the goods in question, nor were the goods warehoused, within the meaning of the Act relating to Banks and Banking, 34 Vic. ch. 5, secs. 10, 46, and 47, D. He was not in possession of or the keeper of the piece of land on which the goods were, which was part of the Car Wheel Company's yard, not fenced off or distinguished in any way from the rest of the Company's property or works. He never had possession of the goods, and therefore could not grant valid warehouse receipts. The property in the goods never passed, because the plaintiff was not a warehouseman thereof within the meaning of the Banking Act, and never really had possession or custody of the lands or the goods. He merely lent himself to the Consolidated Bank, giving the receipts for its accommodation and taking the bank's indemnity for the forthcoming of the goods, a course which shows that the Consolidated Bank, if any one, was really the warehouseman of the goods in question. The conditions of the Banking Act respecting warehouse receipts must be strictly fulfilled, otherwise no property passes, and the endorsement of the warehouse receipts to the Standard Bank was clearly not valid: *Deady v. Goodenough*, 5 C. P. 176; *Glass v. Whitney*, 22 U. C. R. 294; *Royal Canadian Bank v. Miller*, 29 U. C. R. 266; *Royal Canadian Bank v. Ross*, 40 U. C. R. 466; *Ontario Bank v. Newton*, 19 C. P. 258;

Todd v. Liverpool, and London Globe Insurance Company, 20 C. P. 524; *Bank of British North America v. Clarkson*, 19 C. P. 182; *Paice v. Walker*, L. R. 5 Ex. 183. The defendants submit that *Re Coleman*, 36 U. C. R. 559, is incorrectly decided, but even if the law as there laid down is correct, it is not applicable to the facts of this case, which are clearly distinguishable. At all events the warehouse receipt was invalid as against the defendants, for it is perfectly clear, upon the evidence, that the Car Wheel Company was insolvent at the time, to the knowledge of the Consolidated Bank, and that the granting of the lease to the plaintiff, the giving of the warehouse receipt, and pretended discount of the note by the Standard Bank, were merely colourable transactions, done at the instigation of the Consolidated Bank, for the known purpose of endeavouring to secure an antecedent debt due to that bank, contrary to the provisions of sections 46 and 47 of the Act relating to Banks and Banking, 34 Vic. ch. 5, D., and the sections of the Insolvent Act of 1875 relating to frauds and fraudulent preferences, viz.: sections 130, 131, 132, 133, 134. As to the preference under the Insolvent Act see *Davidson v. Ross*, 24 Gr. 22; *Davidson v. McInnes*, 24 Gr. 414; *Kalus v. Hergert*, 1 App. R. 79. The plaintiff endeavours to support his case by pretending that the Standard Bank really advanced the money to the Car Wheel Company instead of the Consolidated Bank, on the security of the warehouse receipt, but that theory is effectually disproved by the facts themselves, and by the plain inferences to be deduced therefrom. It is clear that the money was not advanced to the Company by the Standard Bank in the usual course of banking business, for it was advanced at the solicitation of another bank without any stipulation as to continuing the account with the Car wheel Company or otherwise. It cannot be supposed that it advanced this large sum of money to the Company on the security of very unsaleable property, and without the usual enquiries and precautions, at a time when the Company was notoriously insolvent. The Con-

solidated Bank had taken advice, and was aware, before it approached the Standard Bank to obtain the money, that it held no security from the Car Wheel Company, and could not take any security in consequence of the debt being already incurred, and also in consequence of the known insolvency of the Company. The Company did not negotiate any loan with the Standard Bank. The Consolidated Bank told Gartshore to go to the Standard Bank and get the money, the money having been previously arranged for by the Consolidated Bank. Gartshore went to the Standard Bank, got the money as a matter of course, without any negotiation therefor with the Standard Bank, and paid it over to the Consolidated Bank. The evidence all shews that the Consolidated Bank was acting through the Standard Bank, and the Standard Bank was merely the agent or representative of the Consolidated Bank, by whom they were to be indemnified. Whatever defence, therefore, the defendants could insist upon as against the Consolidated Bank (the real party in the transactions), the defendants can also insist upon as against the Standard Bank, which acted a nominal part; in other words, the Standard Bank cannot stand in any better position than the Consolidated Bank. The defendants having possession of the property cannot be dispossessed by the plaintiff unless he shows a better title thereto, and the defendants should not be obliged to sue the Standard Bank, or any other party, in order to get the relief against the pretended warehouse receipt to which they are clearly entitled on the facts of the case.

December 23, 1878 (a). Moss, C.J.A.—The first question which I propose to consider upon this appeal is, the plaintiff's title to maintain an action for the conversion of the car-wheels and iron. The counts for trespass *de bonis asportatis* and to lands, were not insisted on, and may be dismissed without remark.

(a) *Present*.—Moss, C. J. A., BURTON, PATTERSON, and MORRISON, JJ. A.

The gist of the plaintiff's claim is, that he, being in the position of warehouseman of these goods, which were the property of the Toronto Car Wheel Company, at their request, gave in the usual course of business a receipt, which was endorsed to the Standard Bank by way of security for the payment of a promissory note then discounted; and that the defendants having subsequently been appointed the assignees in insolvency of the company, took these goods, and excluded him from the possession thereof, and so disabled him from complying with any demand that the Standard Bank might make upon him for the delivery of the goods.

The evidence disclosed that the City Bank of Montreal, for some months previous to May, 1876, when it became merged in the Consolidated Bank, was a creditor of the Car Wheel Company, and had received documents purporting to be warehouse receipts, signed by P. D. Conger, under the provisions of Consol. Stat. C., 22 Vic. ch. 54, and 34 Vic. ch. 5. Conger was not engaged in the calling of a warehouseman. He was a coal merchant in this city, and it does not appear what led to his being induced to assume the semblance of being a warehouseman or storekeeper for the company. This much is clear from his evidence, that for at least a year he granted receipts for their accommodation, without having their goods in any warehouse belonging to him, and without exercising any control. In truth, the only part of the business of a warehouseman which he discharged, was that of signing his name to receipts.

He says that afterwards he was advised that it would be safer for him to take a lease of the portion of the premises where this property was stored. As his recollection is that the conversation upon this subject was with the representative of the Consolidated Bank, and the manager and solicitor of the company, it is probably not too much to infer that the safety of others besides himself was taken into deliberation. As the result of this anxiety for his security, a lease was made to him by the Car Wheel Co. of the portion of the premises upon which these goods were

stored, bearing date November 27, 1876; but it seems to have been insufficient to allay his disquietude for any considerable period, inasmuch as on the 14th of December, 1876, a by-law of the company was passed, which—after reciting that Mr. Conger, lately a warehouseman for the company, had declined to continue to act any longer in that capacity, and that it was necessary to employ some other person forthwith to act as a warehouseman or yard keeper, with whom to store 1,400 car wheels, and 350 tons of pig iron, for the purpose of and to assist in conducting the business of the company, by obtaining a warehouse receipt upon which to raise money for the purpose of the company—empowered the manager to employ a warehouseman who would be adequate to meet the exigency. It would seem that the Consolidated Bank had so far appreciated the necessity for this arrangement being made that their solicitors had prepared the by-law, and the resolution upon which it was founded. On the 15th of December Conger surrendered his lease, and the Car Wheel Company on the same day demised a portion of their premises, minutely defined by feet and inches, to the plaintiff, who had been selected to fill the office which had been vacated by Conger. This lease did not in itself impose any heavy burden upon the plaintiff, for the rent reserved was only \$5 for the year. For some unexplained reason, however, the lessee desired at an early moment to relieve himself from liability for it, as he paid it four days after the date of the demise, although by its terms it was not payable until the expiration of a year. On the next day he received \$50 from the Consolidated Bank, which enabled him to make an entry of \$45 to profit and loss, and on the same day he received from the bank a written guarantee that the car wheels and iron stored with him as warehouseman in the yard leased to him by the Car Wheel Company should be forthcoming, whenever they were required. It appeared from his evidence taken upon his examination before the trial, that he was a warehouseman carrying on business at the Yonge street wharf, and

that he engaged in this particular undertaking in consequence of a conversation with the agents of the Consolidated Bank, by whom he was informed that the Car Wheel Company wanted to get an advance from the bank and wished to obtain a warehouse receipt. Before giving the receipt he sent his foreman to see the car wheels and iron, but he did not make any personal examination, and he had no communication with the Standard Bank. He only required the land mentioned in the lease for the purpose of "that business"—that is, in order to give receipts to enable the company to obtain an advance from the Consolidated Bank—and he used it for no other purpose. He understood that he was dealing with the Consolidated Bank and the company. He did not know, but he supposed, that the company was going to get the money from the Consolidated Bank. He seems to have understood that the portion of the company's property demised to him was to be marked by stakes, but it is not clear when this ceremony was performed. I think, however, that it was not until some time after the 2nd of January, 1877, when an action had been commenced against the Car Wheel Company.

Upon this state of facts I am of opinion that the plaintiff was not a warehouseman of these goods within the meaning of the Acts, and that the endorsement of a receipt given by him did not transfer any property to the bank. In coming to this conclusion I disregard the circumstances which are effectively dealt with by Mr. Justice Wilson, for the purpose of shewing that the Standard Bank was really the Consolidated Bank in the whole affair. I should feel much difficulty in holding, if the warehouse receipt had been given by a warehouseman in the ordinary course of business, that the transaction was proved to be in its essence a fraudulent preference to the Consolidated Bank. I might not have been able to free my mind from grave suspicions that this was its true character, but I should have thought that this was a question upon which there was the right to a finding by the

Judge or jury who had the opportunity of hearing the witnesses.

But I cannot bring myself to the conclusion that the plaintiff was in this transaction a warehouseman, or that his receipts came within the fair meaning of the Acts which enable this mode of dealing with property to be equivalent under certain circumstances to a chattel mortgage. Those goods were not in a warehouse used by the plaintiff in his business as a warehouseman. He simply had a lease of the land upon which they had been placed by their owners, and this lease had been given and taken in the exceptional way I have endeavoured to describe. The goods were apparently, if not practically, as much in the possession and control of the Car Wheel Company after as before this lease was executed. The plaintiff relied, not upon the actual possession of the goods, but upon the guarantee of the Consolidated Bank, for their production if required. This was in fact the only assurance he possessed that the quantity for which he gave his receipts was on the company's premises, for the inspection by his foreman was of a most perfunctory character. It seems to me that in sustaining the encroachment upon the policy of the Act relating to chattel mortgages, which is necessarily involved in rendering warehouse receipts their practical equivalent, the Legislature did not authorize this casual creation of a warehouseman for a temporary purpose. In *The Bank of British North America v. Clarkson*, 19 C. P. 178 the present Chief Justice of the Court of Queen's Bench, in tracing the history of the law upon the subject, observed: "It may, I think, be fairly assumed that the Legislature at first contemplated the case of parties storing goods in a general warehouse, and taking the receipt of its keeper therefor, and that a certain commercial value should be impressed on these receipts, enabling the holders to obtain credit and raise money upon them, a matter naturally of vast importance in a community dealing largely in agricultural productions." He points out that to afford further facilities it was provided that a warehouseman,

who was the owner of the property, might give an equally effectual receipt for goods in store, and that this power was liable to abuse. I think the learned Judge struck the key note to the true rendering of the statute. The warehouseman must himself have a warehouse, in which the goods are stored, so as to free the transaction to some extent at least from the evils struck at by the Chattel Mortgage Act. Certainly, I think, the abuses to which the giving of receipts by a person combining the character of owner and warehouseman are not greater than those which might be apprehended from supporting such transactions as that we are now considering. Any safeguard that may be conceived to be erected by the goods being in the actual possession and upon the property of a warehouseman or yard keeper, was absent.

In my opinion it is sufficient for the disposition of the case to say that the plaintiff had neither possession nor property in those goods to entitle him to sue the assignees of the Car Wheel Company, and his appeal should therefore be dismissed with costs.

PATTERSON, J. A.—The Toronto Car Wheel Company owed the Consolidated Bank in December, 1876, about \$20,000. By way of security the bank held documents in the form of warehouse receipts signed by P. D. Conger. These receipts were not worded exactly alike, but the purport was that Conger had received from the Car Company, and had warehoused in a yard at the corner of Front and Cherry streets, in Toronto, certain numbers of car wheels, and certain quantities of pig iron, to be delivered pursuant to the order of the company; and that the documents were to be regarded as receipts under the provisions of Statute 34 Vic., ch. 5, of the Statutes of Canada, entitled an Act relating to Banks and Banking.”

Conger was a coal dealer, and had a wharf, but was not a warehouseman.

The yard where the wheels and iron were was part of the Car Company's premises; and up to 27th of November,

1878, Conger, although he had given every receipt of the series before that date, had no interest in the yard, nor any control of it, or of the property mentioned in his receipts. The whole transaction was fictitious. He had not received the property from the company; he had not warehoused it; he was not a warehouseman; but the property was on the premises and under the control of the Car Wheel Company, and free from the possession and control of Conger.

On the 27th of November, in order to give a slight colouring of reality to the transaction, a lease of the part of the premises where the articles lay, was made by the Car Company to Conger; but he was dissatisfied with his connection with the affair, and, as he says, he did not think it safe to continue to give receipts, and would not jeopardize his reputation as a merchant by being mixed up with the affair; and therefore on the 15th of December, 1876, he surrendered the lease and got back his receipts.

Then the transaction was effected which is directly in question.

On the 14th of December, a by-law was made by the Car Company in these words:—

“ *Whereas*, P. D. Conger, late a warehouseman for the Toronto Car Wheel Company, has declined to continue to act any longer as such warehouseman;

“ *And whereas*, it is desirable and necessary on behalf of the company aforesaid to employ some other person forthwith to act as a warehouseman or yard keeper, with whom to store fourteen hundred car wheels and three hundred and fifty tons of pig iron, for the purpose of and to assist in conducting the business of the said company by obtaining a warehouse receipt, upon which to raise money for the purpose of the company;

“ *Resolved*,—That the manager be authorized to employ a warehouseman who will take charge of, store, and be responsible for the said car-wheels and iron, and that a lease of the yard occupied by Mr. Conger and leased to him be executed to such warehouseman as the manager may employ.

The above resolution was duly passed at a meeting of the Board of Directors of the Toronto Car Wheel Company, held this day in the office of the company, and ordered to be inserted as a by-law of the company."

The person employed in pursuance of this by-law was the plaintiff. He is a wharfinger and warehouseman in Toronto, carrying on his business at a distance from the Car Company's premises.

At the request of the manager of the Consolidated Bank, Mr. Turnbull, the plaintiff consented to accept a lease of the place where the property lay, and which he was given to understand would be staked off from the rest of the yard, but which in fact I do not understand to have been ever staked off. A lease was made to him accordingly at \$5 a year, which appears to have been paid by the Consolidated Bank. He then gave a warehouse receipt; and at the request of Mr. Turnbull, the Standard Bank discounted a note made by the Car Wheel Company for \$21,400, taking as security the plaintiff's warehouse receipt, endorsed over by the Car Company.

The Consolidated Bank gave a written guarantee to the plaintiff in these words:—

"THE CONSOLIDATED BANK OF CANADA.

"Toronto, 20th December, 1876.

"DONALD MILLOY, Esq.,

"Dear Sir,—The Consolidated Bank of Canada hereby guarantees that the fourteen hundred car wheels and three hundred and fifty tons of pig iron, stored with you, as warehouseman, in the yard leased to you by the Toronto Car Wheel Company, Toronto, will be forthcoming when ever required by you."

The proceeds of the note were paid over in bills, and handed to the Consolidated Bank in payment of the old debt.

This seems to have been completed by the 20th of December.

The plaintiff had not seen the property or the premises he had leased, but his recollection, as stated in his evidence,

is, that his foreman had seen the car wheels and pig iron before the receipt was given.

An attachment in insolvency issued against the Car Company on the 21st of February, 1877, and the defendants, who are joint assignees in insolvency, seized the property on that day.

The attachment had been preceded by a notice given on the 20th of January, 1877, on behalf of the Merchants' Bank of Canada, of intention to apply on the 23rd of January for a writ of attachment under sub-section 1 of section 147 of the Insolvent Act of 1875.

Against the plaintiff's right to recover it is objected:

(1) That the property never vested in him.

(2) That if he ever was bailee of it for the Car Company, he retained that character, because the endorsement of the warehouse receipt was ineffectual to pass the property to the Standard Bank, for three reasons.

(a) Because the plaintiff was not a warehouseman.

(b) Because the transaction was in reality with the Consolidated Bank, and was therefore in effect a pledge in security for an antecedent debt.

(c) Because it was void under the provisions of the Insolvent Act.

I am unable to hold that the Insolvent Act avoids the transaction without drawing inferences of fact which should properly have been drawn by the Judge at the trial, but which have not been drawn by him.

His finding that the advance was made by the Standard Bank on the security of the warehouse receipt, and on the recommendation of the Consolidated Bank," when read by the light of the evidence before us, makes it proper to hold, as was done in the Court below, that the transaction cannot be treated as an independent one on the part of the Standard Bank, but must be regarded as affected by whatever infirmities would have pertained to it if made directly with the Consolidated Bank.

But when we attempt to apply to it the enactments of the Insolvent Act, we have to look more closely into the facts before us.

The charge is that the pledge of the goods has been made by the Car Company in contemplation of insolvency by way of security for payment to the Consolidated Bank, whereby that creditor obtains, or will obtain, an unjust preference over the other creditors.

This comes under the 133rd section.

It is not to be presumed that the pledge was made in contemplation of insolvency; because it was made on the 20th of December, and nothing was done towards proceedings in insolvency until the 20th of January, when a notice was served, which I am not at present prepared to hold was such a demand as section 133 speaks of. It was at all events not within thirty days after the endorsement of the warehouse receipt.

The first fact therefore, viz., the contemplation of insolvency, has to be established by evidence; and no such fact is found.

Then as to the preference being unjust. Assuming, as for our present purpose we are assuming, that these receipts are operative, the circumstances would have to be weighed, that the Consolidated Bank had in fact depended on the security of these goods, and had made their advances on that security; and that the change from one warehouseman to another, which an accident made necessary, restored the property for an instant to the control of the Car Company, might not touch the justice of the Bank's claim to be secured in preference to creditors the dates or particulars of whose debts we know nothing of.

We have not the materials for a decision, even if it was properly our province to decide, that the preference was unjust.

The onus of establishing these facts was upon the defendants, and therefore the uncertainty in which they are left affords no ground for setting aside the plaintiff's verdict.

In my opinion, however, the other objections are fatal to the plaintiff's claim.

I do not think he had either possession of the goods or special property in them.

On this point the onus is upon the plaintiff, and he has failed in giving evidence which would in my judgment be proper to submit to a jury.

His right is rested solely on his having a demise of the land on which the goods lay; but along with this it is shewn, not only that he had no actual possession or control of the goods, but that it was not in contemplation that he should have it. The guarantee he required from the bank for the forthcoming of the goods, while sufficient evidence of this, is only one fact in a consistent series.

The declaration has a count for trespass *de bonis asportatis*, and one for trespass *quære clausum fregit*, as well as a count in trover.

There is no evidence whatever of any entry on the land, and the evidence respecting the goods is the defendant Anderson's statement, "I took possession of this property on that day; no person interfered with me in taking possession."

In what way possession was taken does not appear; and it is not likely that anything more was done than putting some one in charge of the whole premises of the Car Company. This might be such an assertion of dominion as to amount to a conversion of the goods; and, nothing more than this being shewn, it is unnecessary to look beyond the trover count. The only object in looking beyond it would be to discover some technical cause of action that would support a nominal verdict for the plaintiff. I doubt if that object would be meritorious, and I do not think the search would be successful.

The title necessary to maintain trover is discussed in 2 Wms. Saund in the notes to *Wilbraham v. Snow*. At p. 94 it is said, "It is an ancient rule of law that in the case of a simple bailment of a chattel without reward, trover will lie either for the bailor or bailee, if it be taken out of the bailee's possession—for the latter by virtue of his possession; for the former by reason of his property:" citing *Nicholls v. Bastard*, 1 C. M. & R. 659, from the headnote of which case the passage is chiefly taken; *Manders v.*

Williams, 4 Exch. 339; and the words of Parke, B., in *Re Vincent*, 2 Denison's Crown Cases, at p. 468.

I find authority for the maintenance of the action in some cases where there exists a special property, although the plaintiff has never had actual possession, as in *Evans v. Nichol*, 3 M. & G. 614; but here there was neither property nor possession.

If we concede that the lease gave a right to the possession of the land, that seems to be as far as the facts will carry us. If actual possession had been taken there might be room to argue that possession of all that was on the land went with it; but there was no actual possession of either land or goods. There was merely an agreement that the plaintiff should pretend to have possession, and on that pretence give a warehouse receipt.

But if this difficulty were successfully surmounted, and actual possession in the plaintiff shown, the assignee in insolvency of the Car Company would be entitled to the goods, unless they passed by the endorsement of the warehouse receipt to the Standard Bank.

The Act respecting Banks and Banking, 34 Vic., ch. 5, sec. 47, forbids the transfer of a warehouse receipt, &c., to secure payment of any bill, note or debt, unless the bill, note, or debt, be negotiated or contracted at the time of the acquisition thereof by the bank, or upon the understanding that the receipt, &c., would be transferred. Upon this it is argued that as the transfer to the Standard Bank was in reality to secure an antecedent debt of the Consolidated Bank, it was forbidden by the Statute.

I do not take that view of it. I think that although the two banks were so identified that the interest of the one might, under the provisions of the Insolvent Act, vitiate a transaction which in form was effected by the other, yet the Standard Bank having really advanced its money, had a right to take the security in question under the terms of the Banking Act, even though the money was to go to pay the old debt of the other bank; and I do not perceive that this is affected by the circumstance that

the bank which was benefited agreed to save the other harmless.

In giving effect to the transfer of vouchers of the class of warehouse receipts, the Legislature added a mode of transferring personal property to those previously known to the law. The same thing could have been done before, but by a less simple process. We are not required by any principle to withhold the full effect of the statutes from any transaction that comes fairly within their terms. See *Royal Canadian Bank v. Miller*, 28 U. C. R. 593; *Bank of B. N. A. v. Clarkson*, 19 C. P. 182.

We must not, however, extend those terms by construction. And we must not lose sight of the policy of the law as evidenced by other legislation in *pari materid*. The principle embodied in our Bills of Sale Acts had been adopted by the Legislature a number of years before 1859, when (by 22 Vic. ch. 20,) the negotiation of the securities we are considering was first permitted. The object of the Bills of Sale Acts was to guard against fraud by requiring a public record of the conveyance when the ownership of goods and chattels was changed without an actual change of possession.

The law of 1859, which permitted a change of property to be effected by the endorsement of the receipt of the custodian of the property, did not ignore that principle, because it dealt only with property which was out of the actual possession of its owner. And when, two years later, (24 Vic., ch. 23,) the owner was in some cases enabled to give his own receipt as security, that power was only extended to an owner who was *engaged in the calling* of a warehouseman, &c., giving receipts in such his capacity.

In the Act of Canada, 34 Vic., ch. 5, secs. 46, 47, 48, &c., the same language is employed. The owner who may negotiate his own receipt must, by sec. 48, be *engaged in the calling* of covekeeper, keeper of a wharf, yard, harbour, &c., &c. By sec. 46, the bank may acquire and hold any cove receipt, or any receipt by a covekeeper, or by the keeper of any wharf, yard, harbour, or other place,

any bill of lading, any specification of timber, or any receipt given for cereal grains, goods, wares or merchandise, stored or deposited in any cove, wharf, yard, harbour, warehouse, mill, &c., &c.

These car wheels and the pig iron, which were and remained in the actual and visible possession of the Car Company, might have been transferred as security to the Standard Bank by bill of sale, or any other mode of conveyance known to the common law; but our statutes would have required the registration of the instrument to make the transfer good as against creditors.

There is nothing in the provisions of the Banking Act to which I have just referred, which in my judgment dispenses with these safeguards. The attempts to transfer the property while retaining the actual possession, I regard as an attempt to evade the Bills of Sale Act. I find no countenance for this in the Banking Act. The company could not by its own receipt have effected the security under sec. 48, because it was not engaged in the calling of a keeper of a yard, &c., and a receipt given under sec. 46, must also be by a person engaged in that calling, and given in his capacity as such keeper, &c. This view of the statute is well stated by Mr. Justice Gwynne in his judgment in *Ontario Bank v. Newton*, 19 C. P. 258. The receipt given by the plaintiff was not given in his capacity of yard keeper or warehouseman—for though it happened that he had a wharf and a warehouse, and was engaged in the calling of wharfinger and warehouseman, this transaction had nothing to do with his exercise of that calling. He was not the keeper of the yard where these goods were deposited.

I do not attempt to inquire how far my opinion is sustained by the decisions given in our Courts since the Act of 1859 came into operation. Difference of opinion as to the application of the law in particular cases, and divergent views of the meaning and intention of the Legislature, are to be expected, when a new principle is introduced into the conduct of commercial transactions. We are

therefore, not surprised to find that in some particulars, there has been this difference of judicial opinion upon the effect of the statutes. Instances of this are found in *Royal Canadian Bank v. Miller*, 28 U. C. R. 593; 29 U. C. R. 236; and *Todd v. Liverpool and London Ins. Co.*, 18 C. P. 192, 20 C. P. 523; and some other cases.

My opinion that the plaintiff by taking the lease did not *ipso facto* become warehouseman of the goods lying on the demised premises, so as to be able to give a receipt which the statute would recognise, may perhaps conflict with the grounds on which part of the judgment proceeded in the insolvency appeal *Re Coleman*, 36 U. C. R. 559. I am not sure that there is really a conflict, because there were circumstances in that case which do not exist here. But except so far as that case may have proceeded upon a reading of the statute different from that which I have adopted, I think my views are in harmony with the general current of opinion.

I think the appeal should be dismissed, with costs.

BURTON and MORRISON, JJ.A., concurred.

*Appeal dismissed.**

* This case has been carried to the Supreme Court, and stands for argument.

BARNED'S BANKING COMPANY V. REYNOLDS.

“The (Imperial) Companies' Act, 1862”—Order making calls against past member—Right of action thereon.

The plaintiffs, a company formed and registered in England under the Companies' Act, 1862, which was being wound up. sued the defendant who was a past member, placed on the list of contributories, for the amount of certain calls which he was ordered by the Court of Chancery in England to pay to one of the two official liquidators appointed.

Held, GALT, J., dissenting, reversing the judgment of the Queen's Bench, 40 U. C. R. 435, that the liability of the defendant to pay the calls was a debt, which originated at the time he became a holder of the shares, and that the plaintiffs were entitled to sue him here for the recovery thereof.

THIS was an appeal from a judgment of the Court of Queen's Bench allowing a demurrer to the declaration, reported 40 U. C. R. 435.

The action was brought to recover from the defendant the amount of calls made on him under the Companies' Act, 1862, (Imperial) as a past member of the plaintiff company.

The declaration, as originally framed, charged the defendant as a member of the company, and was met by a plea shewing that he was a past member only.

These pleadings were held good on demurrer, but it was held that the declaration charged defendant as a present member only, and could not be sustained by proof that he was a past member: 36 U. C. R. 256.

The declaration was then amended, in order to charge defendant as past member, and then read as follows:—

That by a Law or Act of Parliament of Great Britain and Ireland, called the Companies Act of 1862, it was and is, among other things, enacted as follows:—

6. Any seven or more persons associated for any lawful purpose, may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this Act in respect of Registrations, form an incorporated company, with or without limited liability.

7. The liability of the members of a company formed under this Act, may, according to the memorandum of association, be limited, either to the amount, if any, unpaid on

the shares respectively held by them, or to such amount as the members may respectively undertake by the memorandum of association to contribute to the assets of the company in the event of its being wound up.

38. In the event of a company formed under this Act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for the payment of the debts and liabilities of the company, and the costs, charges and expenses of the winding up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with the qualifications following—that is to say :

1. No past member shall be liable to contribute to the assets of the company if he has ceased to be a member for a period of one year or upwards, prior to the commencement of the winding up.

2. No past member shall be liable to contribute in respect of any debt or liability of the company, contracted after the time at which he ceased to be a member.

3. No past member shall be liable to contribute to the assets of the company unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act.

4. In case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member.

74. The term “contributory” shall mean every person liable to contribute to the assets of a company under this Act, in the event of the same being wound up ; it shall also, in all proceedings for determining the persons who are to be deemed contributories, and in all proceedings prior to the final determination of such persons, include any person alleged to be a contributory.

75. The liability of any person to contribute to the assets of a company under this Act in the event of the same being wound up, shall be deemed to create a debt (in

England and Ireland, in the nature of a specialty), accruing from such person at the time when his liability commenced, but payable at the time, or respective times, when calls are made as hereinafter mentioned for enforcing such liability.

79. A company under this Act may be wound up by the Court as hereinafter defined, under the following circumstances, that is to say: (4.) Whenever the company is unable to pay its debts. (5) Whenever the Court is of opinion that it is just and equitable that the company should be wound up.

80. A company under this Act shall be deemed to be unable to pay its debts.

(4.) Whenever it is proved to the satisfaction of the Court that the company is unable to pay its debts.

81. The expression "The Court" as used in this part of this Act shall mean the following authorities: In the case of a company registered in England that is not engaged in working any mine within and subject to the jurisdiction of the Stannaries—the High Court of Chancery.

83. Any Judge of the High Court of Chancery may do in Chambers any act which the Court is hereby authorized to do.

92. For the purpose of conducting the proceedings in winding up a company and assisting the Court therein, there may be appointed a person or persons to be called an official liquidator or official liquidators, and the Court having jurisdiction may appoint such person or persons, either provisionally or otherwise, as it thinks fit, to the office of official liquidator or official liquidators. In all cases if more persons than one are appointed to the office of official liquidator, the Court shall declare whether any act hereby required or authorized to be done by the official liquidator is to be done by all or any one or more of such persons.

98. As soon as may be after making an order for winding up the company, the Court shall settle a list of contributories, with power to rectify the register of members in all cases where such rectification is required, in pursuance of this Act, and shall cause the assets of the company to be collected and applied in discharge of its liabilities.

102. The Court may, at any time after making an order for winding up a company, and either before or after it has ascertained the sufficiency of assets of the company, make calls on and order payment thereof by all or any of the contributories, for the time being, settled in the list of contributories, to the extent of their liability, for payment of all or any sums it deems necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding it up, and for the adjustment of the rights of the contributories amongst themselves.

106. Any order made by the Court in pursuance of this Act upon any contributory, shall, subject to the provisions herein contained for appealing against such order, be conclusive evidence that the monies, if any, thereby appearing to be due or ordered to be paid, are due, and all other pertinent matters stated in such order are to be taken to be duly stated as against all persons and in all proceedings whatsoever, with the exception of proceedings taken against the real estate of any deceased contributory, in which case such order shall be only *prima facie* evidence for the purpose of charging his real estate, unless his heirs or devisees were on the list of contributories at the time of the order being made.

And that the plaintiffs are a company duly incorporated and registered in England under the said Act, and limited by shares, and the defendant was the holder of one hundred shares in the capital stock of the said company, and was in respect of the said shares a member of the said company, and had not ceased to be a member for the period of a year or upwards prior to the commencement of the winding up hereinafter mentioned, and was liable in respect of the said shares to contribute as a past member to its assets, in the event of its being wound up; and the said company became unable to pay its debts; and thereupon such proceedings were had in the High Court of Chancery in England, before the Master of the Rolls, one of the Judges of that Court, that it was proved to the satisfaction of the said Court that the said company was

unable to pay its debts, and the said Court was of opinion that it was just and equitable that the said company should be wound up, and an order was duly made by the said Court for the winding up of the said company by the said Court, and all things happened and were done necessary to make the said order valid under the said Act, and by other orders of the said Court, Harwood Walcot Banner and John Young were duly appointed official liquidators of the said company, and by another order of the said Court, made as soon as might be after the making of the said order for winding up the said company, the said Court duly settled the list of contributories to the assets of the said company, and thereby declared the defendant to be and settled him on the said list as a contributory in respect of the said one hundred shares, as a member or contributory in his own right and as included in the list of contributories, on the sixth day of December, A.D. 1867; and afterwards by an order duly made on the second day of January, 1870, by the said Court, the said Court made a call upon the defendant of thirty-three pounds sterling per share, in respect of fifty of the said shares, for which the defendant had been so settled on the list of contributories, and a call of thirty-nine pounds ten shillings sterling per share in respect of the other fifty of the said shares, and ordered that the defendant should on or before the ninth day of September, 1870, or within twenty-four days after the service of the said order, pay the said sum of three thousand six hundred and twenty-five pounds to the said Harwood Walcot Banner, of 26 North John street, Liverpool, in the county of Lancaster, one of the said official liquidators, such sum being, and being by the said order declared to be, the amount due from the defendant in respect of the said calls of thirty-three pounds per share, and of thirty-nine pounds ten shillings per share. And the said order was before the said ninth day of September duly served upon the defendant, and the said Act of Parliament or law during all the time aforesaid was and still is in full force, and was and is the law of England; and all things happened and were

done, and all times elapsed necessary to render the defendant liable to pay the said sum of money and to entitle the plaintiffs to maintain this action for the non-payment thereof, and the said sum of money is equal to the sum of seventeen thousand six hundred and forty-two dollars of lawful money of Canada. Yet the defendant has not paid the same. And the plaintiffs claim thirty thousand dollars.

To this the defendant demurred, upon the following grounds :

That the declaration does not shew any facts or circumstances which, under the laws in force in this Province, give the plaintiffs any right of action against the defendant : that said declaration does not shew that under the alleged Act of Parliament, or under the law of England, the plaintiffs have any right of action against the defendant : that it appears by said declaration that the said company of the plaintiffs is being wound up by the High Court of Chancery in England, and under the authority of the alleged Act of Parliament in the declaration mentioned, and the plaintiffs are not shewn to have the power under said Act to sue or bring actions for any call made by said Court : that it is not shewn that any calls were made on the alleged shares before said order for winding-up was made, or that the defendant was the holder of the said shares or any of them at the time of making any such calls, or that he ever became indebted to the plaintiffs upon or in respect of the said shares or any of them : that it appears by said declaration that defendant had ceased to be the holder of any of the said shares before the commencement of the winding up of the said company, and that the defendant was at most only a past member : that under the law of this country the defendant would not be liable for any call made after he ceased to be a holder of said shares, and the declaration does not shew any provision of English Law that makes him liable to the plaintiffs for any such call : that it appears by the English law, as set out in said declaration, that a past member, like the defendant, is not subject to the same liability as a present member,

and said declaration does not shew that any debts or liabilities of the said company existed to or in respect of which defendant was liable to contribute, or in respect of which he could be placed on the list of contributories, or that he was liable to contribute any thing: that as the plaintiffs are now suing on a law not in force in this country, and are claiming a liability which does not exist under the laws of this country, they are bound to shew that the liability they claim clearly exists under the English law, which they have not done: that it appears by said declaration that after an order has been made for winding up a company, all power in regard to collecting or getting in the assets of the said company is vested in the said Court of Chancery, which is specially appointed the tribunal for that purpose, and with special and extraordinary powers which cannot be enforced in this country: that it appears that any proceedings had are not final, and that the said Court has power to rectify the list of contributories, and could at any time remove the defendant's name from such list: also, that said Court has the power to restore to the defendant all or any part of the monies which he might pay under the said order making said calls; and that the English law as presented by said declaration shews that the proceedings had are not final in their character like a judgment, and the rights of the plaintiffs, if any, can be enforced only by said special tribunal, and not by suit at law in this country.

The Court of Queen's Bench, Mr. Justice Wilson dissenting, held the declaration bad.

The plaintiffs appealed.

The case was argued on the 18th January, 1878 (a).

C. Robinson, Q.C., for the appellants. The authorities establish that the plaintiffs are entitled to sue the defendant on the order of the Court of Chancery mentioned in the declaration, notwithstanding the fact that by that

(a) *Present*.—MOSS, C. J. A., BURTON, PATTERSON, J. J. A., and GALT, J.

order the money is to be paid to one of the liquidators: *Turquand v. Kirby*, L. R. 4 Eq. 123; *United Ports and General Insurance Co. v. Hill*, L. R. 5 Q. B. 395; *In re London Cotton Co.*, L. R. 2 Eq. 53; *In re Oriental Inland Steam Co. ex parte Scinde R. W. Co.*, L. R. 9 Chy. 557, 560; *In re Barned's Banking Co. ex parte Contract Corporation*, L. R. 2 Chy. 350; *In re Contract Corporation, Gooch's Case*, L. R. 7 Chy. 207; *Lindley on Partnership*, 3rd ed., 515, 1334. By becoming a member of the plaintiffs' company the defendant has agreed to be bound by the statute governing the company, and under the statute and the proceedings in the Court of Chancery mentioned in the declaration, a liability has been created from the defendant to the company, which is sufficiently set out in the declaration: *Copin v. Adamson*, L. R. 9 Ex. 345, 1 Ex. Div. 17; and the plaintiffs can sue in this Province at law on the order above referred to. It matters not whether the defendant's liability is founded on merely statutory and equitable grounds or otherwise, and the Courts will not prevent the plaintiff suing here, otherwise there would be a failure of justice: *In re Oriental Inland Steam Co., ex parte Scinde R. W. Co.*, L. R. 9 Chy. 557; *Henley v. Soper*, 8 B. & C. 16; *Patrick v. Shedden*, 2 E. & B. 14; *Russell v. Smythe*, 9 M. & W. 810; *Gauthier v. Routh*, 6 O. S. 602; *Tarleton v. Tarleton*, 4 M. & S. 20; *Little v. Ince*, 3 C. P. 528; *Corporation of County of Frontenac v. Corporation of Kingston*, 30 U. C. R. 584; *Municipal Council of County of Wellington v. Municipality of Township of Wilmot*, 17 U. C. R. 82; *Murray v. Dawson*, 17 C. P. 588; *McGiverin v. James*, 33 U. C. R. 203; *Lindley on Partnership*, 3rd ed., 1303; *Alivon v. Fournival*, 4 Tyrw. 751 and 771; *La Banca Nazionale Sede di Torino v. Hamburger*, 2 H. & C. 330.

S. Richards, Q. C., for the respondent. The defendant had ceased to be a shareholder in the company before the making of the order for winding up, and long before the making of the alleged calls by the High Court of Chancery, and all privity of contract and all liability to the plain-

tiffs had ceased before the making of the calls. The liability of a past member is a statutory one, not in any way arising out of contract; *Morris's Case*, L. R. 8 Chy. App. 807, 808; and it is a contingent one, to contribute only in respect of debts or liabilities contracted before he ceased to be a member, and only in case the existing members are unable to satisfy the contributions required to be made. Moreover such liability is to the creditors and not the company. *Macbeth v. Smart*, 14 Gr. 298; *Ryland v. Delisle*, L. R. 3 P. C. 17; *Re Paraguassu Steam Tram Road Co.*, *Black & Co's. Case*, L. R. 8 Ch. 254; *Benner v. Currie*, 36 U. C. R. 411; *McGregor v. Currie*, 26 C. P. 55; *Blyth's Case*, L. R. 4 Ch. Div. 140. It is not sufficient for the plaintiffs to shew that a liability of some kind exists, but they must shew a liability to themselves as plaintiffs, or in respect of which they are expressly authorized to sue. The declaration does not shew that under the alleged Act of Parliament the plaintiffs have or ever had any right of action against the defendant, nor are there any facts shewn which under the law of this country authorize the maintaining of this action by the plaintiffs. Neither is it shewn by the declaration that any debts or liabilities existed or exist to or in respect of which the defendant as a past member was or is liable to contribute. The right, if any, against the defendant as a past member being created only by statute, and a specific remedy being given by proceedings in the High Court of Chancery, which is specially constituted a tribunal for the purpose, with special and extraordinary powers, the right and remedy must be enforced in the special tribunal, and cannot be enforced by action at law in this country: *Stevens v. Evans*, 2 Burr. 1152, 1157; *Dundalk R. W. Co. v. Tapster*, 1 Q. B. 667; *Steward v. Greaves*, 10 M. & W. 711; *Chapman v. Milvian*, 5 Ex. 61; *Vestry of St. Pancras v. Batterbury*, 2 C. B. N. S. 477; *Berkeley v. Elderkin*, 1 E. & B. 805; *McPherson v. Forrester*, 11 U. C. R. 362; *Donnelly v. Stewart*, 25 U. C. R. 398; *Murray v. Dawson*, 17 C. P. 588; *Story's Conflict of Laws*, 7th ed., secs. 267, 569, 25 (a); *Erickson v. Nesmith*, 15 Gray 221, 4 Allen, 233.

It appears that the High Court of Chancery has power to rectify the list of contributories, to settle the rights of contributories among themselves, to make calls of the whole amount unpaid on shares, and order payment thereof without having ascertained or enquired as to the sufficiency or insufficiency of assets. That Court may yet vary or rescind the said order for payment of these calls, or may restore to the defendant all or part of the moneys he might pay under it. The proceedings and order for payment of calls are not final in their character, nor in the nature of a final judgment, and the order can be enforced only by the special tribunal, and not by suit at law. *Smith v. Whalley*, 2 B. & P. 482; *Emerson v. Lashley*, 2 H. Bl. 248; *Patrick v. Shedden*, 2 E. & B. 14; *Sheehy v. Professional Life Assurance Co.*, 2 C. B. N. S. 212; *Carpenter v. Thornton*, 3 B. & Al. 52; *Henley v. Soper*, 8 B. & C. 16.

December 23, 1878 (a). Moss, C. J. A.—This case has been treated so exhaustively in the various judgments pronounced in the Court of Queen's Bench, that I cannot hope to add anything to the discussion, but its importance induces me, even at the risk of some repetition, to explain the principal reasons upon which I have arrived at the conclusion that the opinion of Mr. Justice Wilson, who differed from the other members of the Court, is correct.

The appeal comes before us upon a demurrer to the declaration, which the Court below has held not to disclose a sufficient cause of action. For the purpose of the observations I have to make, it is sufficient to note that the action is brought by a company formed and registered in England under "The Companies' Act, 1862," and now being wound up, to recover from a past member, who was placed on the list of contributories, the amount of certain calls, which he was ordered by the English Court to pay to one of the official liquidators at a

(a) *Present*.—Moss, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

designated place. It is settled that in considering such a declaration the Court is not at liberty to take cognizance of any parts of the Imperial Statute that are not pleaded, but upon the argument neither party desired to insist upon this rule, and such provisions of the statute as seemed material were referred to with the greatest freedom. Manifestly this was of no practical consequence, except as affecting the question of costs, because an amendment to supply any omission could not be refused. There was much learned discussion at the bar of the principles by which our Courts are regulated in actions upon foreign judgments, but in my judgment this subject only touches collaterally, if at all, the true grounds of decision. So far as they furnish an analogy, it is quite sufficient to refer to the manner in which they are dealt with by Mr. Justice Wilson.

I do not regard the case in the light of an action brought upon the order for payment made by the Court in England, but as one founded upon an obligation entered into by the defendant upon his becoming a holder of shares in and a member of the company. This obligation did not ripen into a liability to be immediately enforced by process of law until a call had been made by an order of the Court, but it had always existed from the moment the shares were taken. The order, therefore, is only evidence that the condition precedent to the maintainance of compulsory proceedings against the contributory had been fulfilled, and is not the foundation upon which the right of action is rested. The seventy-fifth section, upon the construction of which the controversy mainly turns, is that "the liability of any person to contribute to the assets of a company under the Act, in the event of the same being wound up, shall be deemed to create a debt (in England and Ireland in the nature of a specialty) accruing due from such person at the time when his liability commenced, but payable at the time, or respective times, when calls are made" as therein-after mentioned, for enforcing such liability. This section refers to past as well as to present members, for the 38th section enacts, that in the event of a company formed under

the Act being wound up, every present and past member shall be liable to contribute to the assets of the company, subject to certain conditions for the adjustment of their rights *inter se*.

If then the question be proposed, when did the liability of the defendant commence, the obvious answer, irrespective of authority, would seem to be: at the same time as if he were still a present member, that is, when he took his shares. The existence of a debt generally implies the existence of a creditor. Who then was the creditor when the debt originated? Undoubtedly the company. Then the question arises, was this debt transferred from the company to any other person? Nothing appears in the declaration to lead to such an inference, and if we consult the Act itself, we learn that the official liquidator, to whom alone the chose in action could be supposed to have passed, has not the same *status* as an assignee in insolvency. He is invested with powers among which is that of bringing any action in the name and on behalf of the company. It has been suggested that the 75th section owes its origin to the decision in *Re Robinson's Executors*, 6 DeG. M. & G. 517, in which it was held that a call made in pursuance of Winding-up Act of 1848 was not a specialty debt. But I do not think that that hypothesis can be admitted as an element in the interpretation of the statute, and if it could be recognized, I do not perceive what difference it would make in the result.

As to the date of the commencement of the liability, we are not left to our own view of the language of the statute, for there is the high authority of Lord Westbury in a decision which does not seem to have been questioned. At the conclusion of the argument, *Ex parte Canwell*, 4 DeG. J. & S. 539, where the precise point arose, his lordship observed at p. 542, that it was difficult to tell when the liability was to be considered as commencing, but that his impression was that it related back to the date of the contract, and that no other date could be assigned for the commencement of the liability than that of the contract under which the con-

tributory became a member; and after consideration he adhered to this opinion. It is scarcely necessary to repeat that at that date the liability could only be to the company.

In re China Steamship Company, L. R. 7 Eq. 244, Lord Romilly, commenting upon this section said: "the question is, whether that enactment does not create a debt which is *debitum in presenti, solvendum in futuro*; and I am of opinion that it does."

In *Williams v. Harding*, L. R. 1 H. L. 29, Lord Kingsdown observed, that the Act of 1862 had removed all doubt about subsequent cases, by expressly declaring that the call should constitute a debt as from the time when the liability was contracted. I may observe at this point, that Lord Chelmsford said, at p. 26, with reference to the legislation previous to 1862, that upon a review of all the sections of the Acts relating to the official manager it did not appear to him that it was the intention of the Legislature to place him in the position of a creditor, so as to render the contributory's liability to a call made upon him a debt for the recovery of which he would have the remedies of an ordinary creditor. He added these words: "He is rather the mere instrument by which the Master acts in carrying out his duty of winding-up the company."

According to the 92nd section of the Act of 1862, which is recited in the declaration, the official liquidator is appointed for the purpose of conducting the proceedings in winding-up a company, and assisting the Court therein. I think Lord Chelmsford would have held that this did not constitute him a creditor of the contributory.

These considerations bear upon the objection that if an action is maintainable, the official liquidator must be the plaintiff. But there is not wanting authority which seems to me to have a direct application to this point. In *Brighton Arcade Co. v. Dowling*, L. R. 3 C. P. 175, an action was brought at the instance of the liquidator to recover the amount of a call from the defendant, who was

on the list of contributories. Montague Smith, J., said, at p. 189 : " The party may always contest the propriety of his being made a contributory in an action, by shewing that in truth he never was a shareholder, or had ceased to be so." It is true that this was the case of a voluntary winding-up, but I do not perceive from an examination of the Act that that circumstance makes any difference as to the person in whom the right of action is vested. In *Madrid Bank v. Bayley*, L. R. 2 Q. B. 37, an action was brought in the name of the company to recover arrears of calls after a winding-up order, and the case was treated as if an assignee of a chose in action was suing in the name of the assignor.

The language of Sir George Mellish, in *Re Oriental Inland Steam Co.*, L. R. 9 Ch. 560, strikes me as very apposite. He says : " No doubt winding-up differs from bankruptcy in this respect, that in bankruptcy the whole estate, both legal and beneficial, is taken out of the bankrupt, and is vested in his trustees or assignees, whereas in a winding-up the legal estate still remains in the company."

Much stress was laid in argument upon the phraseology descriptive of the liability, being " to contribute to the assets of the company," not " to pay to the company." In *Morris's Case*, L. R. 8 Ch. 810, Lord Selborne explained this to be merely another expression for liability to calls under section 102. From this and the cases already referred to, it follows that the liability of a past member to pay calls is a debt, which originates at the time he becomes a holder of shares.

The learned counsel for the defendant placed great reliance upon the language used by the Lord Chancellor in another part of the same decision. It is this passage at p. 807 : " There is this peculiarity in the liability of past members of a company, that (whatever may be its measure and extent) it is created entirely by statute, and does not result from any contract. It does not result from any contract between the past members and the company ; on the con-

trary, the contract of the present members, who alone constitute the company for the time being, is to bear the whole burden, to the complete exoneration and indemnity of all the past members. Nor does it result from any contract between the past members and the creditors; for the contract of each creditor is (as was pointed out by Lord Cairns, in *Webb v. Whiffin*, L. R. 5 H. L. 711), with the company and not with its individual members." I do not think that there is in this language anything inconsistent with the opinion I have formed. No doubt the liability of the defendant is the creature of the statute, and is not the result of any express contract with the company. It arises not from any positive agreement between the company and the contributory, but from the directions of the statute. This I take to have been the meaning of his lordship, and it does not seem to me to be opposed to the view that these calls are a debt due to the company. In the case of *Webb v. Whiffin*, L. R. 5 H. L. 711, Lord Cairns, in advising the House of Lords, made the following observations, at p. 735: "Now I ask the question, are the contributions to be made by the ex-members the property of the company or are they not? Can it be contended for a moment that they are not? Whose property are they, if they are not the property of the company? Is there any thing in this Act of Parliament, which makes them the property of any other person but the company? It appears to me, my Lords, beyond all doubt, that all unpaid calls, whether from members or ex-members, are part of the property, and the assets of the company." If that be so, I can perceive no good reason why the company should not sue in an Ontario Court to recover the amount of the calls now in question.

I think that the appeal should be allowed, with costs, and judgment entered for the plaintiffs on the demurrer.

PATERSON, J. A.—I am unable to concur with the majority of the Court below.

I agree in general with the views expressed by Mr. Justice

Wilson in giving the judgment of the Court on the former occasion; and I also think with that learned Judge that the same grounds are decisive in support of the declaration in its amended form.

I do not think it necessary to repeat the arguments, or refer to the authorities to be found in that judgment. It will be sufficient to state my views as concisely as may be, and to cite one or two cases not referred to by Mr. Justice Wilson.

The objections stated as grounds of demurrer are repeated in a variety of ways, but they resolve themselves into the following four separate grounds:

1st. That the defendant is not shewn to be liable to the plaintiffs under the English law, or under our law.

2nd. That the defendant being liable only as a past member, the declaration should show debts or liabilities of the company in respect of which he was liable to contribute.

3rd. That the rights of the plaintiffs can only be enforced through the Court of Chancery in England.

4th. That the order is not final.

The judgment of the Court below, which was pronounced by the Chief Justice, deals only with the first of these grounds; but Mr. Richards has pressed also the third and fourth in his able argument before us.

The liability now sought to be enforced against the defendant is that which sec. 75 declares shall be deemed to create a debt (in England and Ireland in the nature of a specialty) accruing from the defendant at the time when his liability commenced.

Whether the debt is or is not a specialty debt here, was discussed on the first demurrer in the Queen's Bench, but it does not arise at present, and I therefore express no opinion upon it.

The liability referred to is created by section 38. It commences when the party becomes a member in respect of the shares for which he is afterwards made a contributory.

This was expressly decided by Lord Westbury in *Re Canwell*, 4 DeG. J. & S. 539.

Being a debt at that time, who was the creditor? Plainly no one but the company, as no one else existed to whom it could be argued the debt accrued.

If it was originally a debt to the company, which accrued while the company was solvent, though it did not become payable until the call was made in the winding up proceedings, there has occurred no process of novation by which it has become a debt to the liquidator, nor has the corporate existence of the company ceased, nor any other event happened to render it uncertain to whom the debt is due.

The existence of the debt being established, the right to bring an action to recover it follows of course, unless restrained by some statutory bar.

The only provision of the statute before us which is pointed to as having this effect, is that which gives the High Court of Chancery the conduct of the proceedings for winding-up the company. One of the powers expressly given to the Court, viz., that conferred by sec. 102, is to make calls and order payment thereof by all or any of the contributories for the time being settled on the list of contributories. The effect of the call is, by sec. 38, to make the debt payable which already existed as a debt.

No provision of the statute which is before us upon this declaration gives any peculiar remedy for the recovery of this debt. But if we assume that power being given to the Court to order the payment of the money, an order made under that power may be enforced by the ordinary process of the Court, it will not follow that an action of debt will not also lie.

The case of *Hutchinson v. Gillespie*, 11 Ex. 798, is a direct authority for this. That was an action to recover the amount of the costs of resisting an appeal to the Privy Council, which the Judicial Committee had ordered to be paid by the appellant. The order was made under the authority of the 15th section of 3 & 4 Wm. IV. c. 41, which

enacted that the costs incurred in the prosecution of any appeal or matter referred to the Judicial Committee should be paid by such party or parties, person or persons, and in such manner as the committee should direct; and 6 & 7 Vic., ch. 38, sec. 12, which enacted that as well the costs of defending any decree or sentence appealed from, as of prosecuting any appeal, or in any manner intervening in any cause of appeal, &c., should be paid by such party or parties, person or persons, as the Judicial Committee should order.

The decision of the Court, consisting of Barons Alderson, Martin, and Bramwell, was, that the action was maintainable.

Alderson, B., said, at p. 812: "Under the Act regulating the jurisdiction of the Privy Council these costs are, upon such order being made, to be paid by the person ordered to pay them. By force of the power given by the Act, the costs become a sum of money due under the authority and by the direction of the Act, and the duty arising out of that is a debt for which the party may sue in a Court of law."

Martin, B., said, at p. 814: "It is a well known rule of law that if a statute directs a sum of money to be paid, unless a specific remedy is given, debt may be maintained for its recovery."

These two Judges do not expressly notice an argument urged by Mr. Bovill, that as by section 28 of 3 & 4 Wm. IV., ch. 41, the Judicial Committee had the same powers of enforcing judgments, decrees and orders, as were exercised by the Courts of Chancery and Queen's Bench, no action would lie upon the order in question. It is disposed of, however, by Bramwell, B. in these words, at p. 815: "But is Mr. Bovill right in saying that, because the Court has power to enforce its orders by execution, no action is maintainable upon them? I am not aware of any cases except those of decrees in equity and judgments in County Courts, in which it has been held that no action will lie upon the final order or judgment of the Court for payment of a sum

of money. Cases of decrees in equity are distinguishable, for there is no implied promise to pay a mere equitable debt. Judgments in County Courts are also distinguishable for the reasons stated in *Berkeley v. Elderkin*, 1 E. & B. 805. Reference has also been made to interlocutory orders for costs. Probably the true reason why no action will lie on such orders is this—the power of Courts of Common law to award costs on a judgment arises from the Statute of Gloucester, 6 Edw. I, ch. 1 ; it may be that the power to award interlocutory costs is a power incident to every Court to enforce due observance of its own rules ; and if so, it is manifest that the disobedience of an order for the payment of such costs is properly punishable by attachment. Whether that is a good ground for the distinction I do not know ; but when an Act of parliament says that the Judicial Committee of the Privy Council shall have power to make orders for the payment of costs, and that the money shall be paid, the case comes within the principle of law, that debt will lie for the money.”

For these reasons I think the declaration is not objectionable on either the first or the third ground.

The second, which was scarcely if at all pressed before us, is answered by sec. 106 of the statute, which declares that any order made by the Court in pursuance of the Act upon any contributory shall, subject to the provisions for appealing against such order, be conclusive evidence that the moneys, if any, thereby appearing to be due or ordered to be paid are due.

On the fourth ground I have nothing to add to what was said by Mr. Justice Wilson, as the unanimous opinion of the Court as constituted when the first demurrer was argued, and which I assume to express the opinion of the Court as now constituted, nothing to the contrary being said in the judgment in review.

The objection rests entirely on the words of section 106, “Any order made by the Court in pursuance of this Act upon any contributory, shall, *subject to the provisions herein contained for appealing against such order*, be conclusive evidence,” &c.

This points to a right of appeal existing, though the provisions confirming it do not appear on this declaration. If necessary to negative the rescission or variation of the order, I agree with the Court of Queen's Bench that this has been sufficiently done by the averment that all things happened and were done, and all times elapsed necessary to render the defendant liable to pay the said sum of money, and to entitle the plaintiffs to maintain this action for the non-payment thereof. But I do not regard the section as touching the question of the finality of the order.

The distinction is between a final and an interlocutory adjudication. This is not in any sense interlocutory. Nothing remains to be done to make it enforceable. What the section deals with is the effect of the order as evidence, and the significance of the enactment seems to be greater in relation to the point first discussed; for it appears to contemplate proceedings to collect the debt, such as an action like the present, or proceedings against the estate of the bankrupt contributory, in which evidence of the debt would have to be produced; and not merely to the enforcement of the order by the Court that pronounced it.

In my opinion the plaintiffs are entitled to judgment upon the demurrer, and this appeal should be allowed with costs.

BURTON, J. A., concurred.

GALT, J.—In considering the demurrer in this case we are necessarily confined to the allegations in the declaration, and to such portions of the English Companies Act of 1862 as are therein set forth. I agree that the provisions of the 38th section constitute an agreement between the persons entering into an association to the effect therein set forth, viz., that in the event of a company formed under that Act being wound up, every past and present member of such company shall be liable to contribute to the assets of the company, to an amount sufficient for the payment of

the debts and liabilities of the company, and the costs, charges, and expenses of the winding up, and for the adjustment of the rights of the contributories among themselves, with the qualifications following: 4th, "In the case of a company limited by shares no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares, in respect of which he is liable as a present or past member."

There are several other qualifications mentioned, but I have referred to the 4th only, as it establishes that whatever may be the nature or terms of the association, they are controlled and enforced only by virtue of the provisions of the Act, as it is manifest that but for those provisions such a qualification would be nugatory. It follows, therefore, that all the provisions of the Act are adopted by the person entering into such an agreement, and that it is part of such agreement that the liabilities of the partners shall be controlled and the assets administered in accordance therewith. By the 75th section, "the liability of any person to contribute to the assets * * shall be deemed to create a debt * * accruing due from such person at the time when his liability commenced, but payable at the times or respective times when calls are made as hereinafter mentioned for enforcing such liability." What then are those times? By sec. 102: "The Court may, at any time after making an order for winding up a company, and either before or after it has ascertained the sufficiency of the assets of the company, make calls on and order payment thereof to the extent of their liability, for payment of all or any sums it deems necessary to satisfy the debts and liabilities of the company." By the 98th section: "The Court shall cause the assets of the company to be collected and applied in discharge of its liabilities."

We find then from the declaration that the Court made an order on the defendant to pay the moneys claimed to a gentleman therein named, who had been appointed an official liquidator, under the Act, whose duty it was was to administer the assets under the direction of the Court. It appears to me to follow that such an ob-

ligation must be enforced in the manner pointed out by the Act, and that all proceedings must be in accordance therewith. Consequently the Banking Company have no authority to institute proceedings in their own name; the estate is to be administered by the Court through the instrumentality of its own officers. As I have already stated, my opinion is based on what appears on the record, and on that alone.

*Appeal allowed.**

GAUHAN V. THE ST. LAWRENCE AND OTTAWA RAILWAY
COMPANY.

Trover—Evidence of conversion of goods—Asportation—Subsequent offer.

The plaintiff, at Guelph, sold to B. & Co. at Ottawa, 65 barrels of pork, and shipped it by the Great Western R. W. Co., the shipping receipt acknowledging the receipt of the same addressed to the plaintiff's order at Prescott, and to notify B. & Co. at Ottawa. The pork was carried by the Great Western Railway and steamer "Passport" to Prescott, her manifest shewing a delivery there into the defendants' charge, and stating that the plaintiff was owner, and that B. & Co. were to be notified. B. & Co. were large dealers in Ottawa, and all goods for them, or in which they appeared interested, were, by arrangement with the defendants, sent on to Ottawa. This pork was accordingly sent on and inspected by B. & Co., who refused to accept it. The plaintiff, who was fully aware of all that had occurred, and that the pork was at Ottawa, swore that he demanded the pork from the defendants' agent at Prescott; but there was no evidence of a refusal, and it appeared that the plaintiff at the same time requested the agent to try and get B. & Co. to accept it. Before the action was brought, the defendants offered the plaintiff his pork at Prescott.

Held, affirming the judgment of the Common Pleas, 29 C. P. 102, that the asportation or the pork to Ottawa did not constitute a conversion.

Held, also, that there was not sufficient evidence of a demand and refusal, but, *semble*, that if there had been, trover could not be maintained after the subsequent offer to give up the pork.

THIS was an appeal from a judgment of the Court of Common Pleas making absolute a rule *nisi* to enter a nonsuit, reported 29 C. P. 102. The facts are stated there, and in the judgment in this appeal.

* This case has been carried to the Supreme Court, and stands for argument.

The case was argued on the 19th November, 1878 (a).

McMichael, Q. C., for the appellant. The rule to enter a nonsuit should have been discharged, as there was evidence for the jury of a conversion or trespass to the goods by the unauthorized removal of them by the defendants from Prescott to Ottawa; and by holding the goods subject to charges, when the defendants had no legal claim upon them in respect of any services rendered to the plaintiff, or in respect of anything done to the goods entitling them to make a charge. What was done by the plaintiff in asking or suggesting to the defendants to try to get Bate & Co. to take the goods was in no manner a waiver of the cause of action that had arisen by reason of the removal of the goods to Ottawa and allowing Bate & Co. to take a portion of them from the defendants' station. The defendants never received the goods as carriers, and as warehousemen they committed a tort as to, and a conversion of, the goods by removing them from Prescott. Exposing the goods in an open shed, and thereby subjecting them to deterioration, was a wrongful act, and being prejudicial to the plaintiff made the original removal from Prescott in law a conversion. At all events there was evidence to go to the jury of a conversion, and therefore the plaintiff could not properly be nonsuited. They referred to *Fouldes v. Willoughby*, 8 M. & W. 547; *Tear v. Freebody*, 4 C. B. N. S. 228; *Hiort v. Bott*, L. R. 9 Ex. 86.

Becher, Q. C., (*Street* with him,) for the respondents. The pork was delivered to the defendants with the steamer's manifest accompanying it, and they received it as bailees for the plaintiff, according to the instructions in the manifest. It was never out of their custody, either in Prescott or in its removal to or during its stay at Ottawa, and was always subject to the plaintiff's order and rights. At no time did the defendants do anything inconsistent with or contradictory of such rights. The removal of the pork to Ottawa was for the convenience of the plaintiff, and of

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Bate & Co., their vendees. It was made in good faith by the defendants in furtherance of the plaintiff's rights, not in contravention of them, and was made known to him immediately, and acquiesced in by him. There was clearly no conversion of the pork by the defendants, either in law or fact; it was always held ready for the plaintiff's instructions. The defendants had a reasonable discretion vested in them by the instructions in the manifest, and their exercise of it in taking the pork to Ottawa for Bate & Co. to inspect, and keeping it there while the plaintiff and his vendees were negotiating about it, could not render the defendants liable in trover or trespass for the pork. The defendants had the right to hold the pork subject to their charges, and if any such charges were unlawful, the plaintiff should have offered to pay what was lawful. The demand of the pork was not such, either in time, place or circumstances, as could be complied with or make a constructive conversion. Moreover, it was waived by the subsequent offer of Mr. Jones, and the plaintiff's reply by telegram, intimating that he was going to sue the Great Western Railway Company for the pork. While in Ottawa the pork was kept by the defendants in the best place they had, and with the knowledge of the plaintiff and his vendees. If any damage occurred to it, it was by his neglect in allowing it to remain there while he was corresponding with Bate & Co., trying to induce them to take it; but even if the defendants had caused injury to the pork by not providing some better place for taking care of it, such negligence would not amount to a conversion. The answers given by the jury, read in connection with the evidence, shew the plaintiff was not entitled to recover, and the finding and conclusion of the Court below thereon was proper and should not be disturbed. They cited *England v. Cowley*, 8 Ex. 128; *Scarfe v. Morgan*, 4 M. & W. 270. *Heald v. Carey*, 11 C. B. 993; *Addison* on Torts, 4th ed., 187; *Hayward v. Seaward*, 1 M. & Sc. 459; *Broom's Legal Maxims*, 210, 202, 209.

December 23rd, 1878 (a). MORRISON, J.A.—The question arising on this appeal is, whether the defendants are liable in trover for the conversion of sixty-five barrels of pork, the property of the plaintiff.

After a careful consideration of the facts appearing in this case, and which it is not necessary to set out at length, as they are fully referred to in the judgment of the Court below. We are of opinion that the conclusion arrived at by the Court of Common Pleas is right and ought to be affirmed. One cannot read the correspondence and the evidence without seeing that there was not at any time any intention whatever on the part of the defendants to dispute the right of the plaintiff to the goods in question, or to assert dominion over them inconsistent with the plaintiff's ownership. The pork came into the defendants' possession lawfully. The asportation of the pork from Prescott to Ottawa, its intended destination, arose from a misapprehension on the part of the defendants' agent at Prescott, owing to the words, "Notify C. T. Bate & Co., at Ottawa," appearing on the abstract of the steamer's manifest delivered to the defendants' agent with the pork, the agent thinking that Bate & Co. were the purchasers of the pork, and that the bill of lading, endorsed by the plaintiff, had been forwarded to Ottawa, which the plaintiff in fact had done, but through a bank, to be handed to Bate & Co. on their acceptance of a draft for the price of the pork attached to the bill of lading.

Assuming the asportation to have been a negligent dealing or improper act on the part of the defendants, that would not render the defendants liable in an action of trover. As said by Brett, J., in giving judgment in *Fowler v. Hollins*, in the Exchequer Chamber, L. R. 7 Q. B. 630: "The true proposition as to possession and detention and asportation seems to me to be, that a possession or detention, which is a mere custody or mere asportation made without reference to the question of the property in goods

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or chattels, is not a conversion. This seems to me to be the proposition also to be deduced from the American cases, which are ably set forth in the third volume of *Robinson's Practice of Courts of Justice*, pp. 452-462."

The same learned Judge, in the same case in the House of Lords, L. R. 7 H. L., at page 785, remarked: "I am still of opinion that a possession or detention, which is a mere custody or mere asportation, made without reference to the question of the property in chattels, is not a conversion." And at page 781 that learned Judge quotes what Channell, B., said in *Burroughes v. Bayne*, 5 H. & N. 305: "I desire it to be understood that I do not mean to state or suggest that every detention is a conversion. I guard myself against any such supposition. Every asportation is not a conversion, and therefore it seems to me that every detention cannot be a conversion. If it were, the mere removal of a chattel, independently of any claim over it in favour of the party himself, or any one else whatever, would be a conversion." And also what Bramwell, B., said in the same case, at p. 308: "It certainly is not every detention of goods (although there is no right to detain them), that is a conversion, in my judgment at all events." Again, at p. 309: "The result is, you must in all cases look to see, not whether there has been what may be called a withholding of the property, but a withholding of it in such a way as that it may be said to be a conversion to a man's own use."

I may also refer to *Heald v. Carey*, 11 C. B., p. 994, where Maule, J., in giving judgment says: "There is no doubt that a negligent dealing by a bailee with goods is not a conversion, and there is equally no doubt that a bailee is not liable for a conversion arising out of a negligent dealing with the goods by him, but which is not an act participated in by him. He may be liable to an action of another description, but not to an action of trover, which only lies where some dominion is asserted by the defendant over the chattel which is the subject of the action."

It is therefore, I think, clear that the plaintiff cannot maintain this action against the defendants by reason of

the transmission of the pork to Ottawa and its detention there. It was contended, however, there was a demand upon the defendants' agent at Prescott, and an absolute refusal to deliver the pork, which amounted to a conversion.

What is a proper definition of the term conversion has given rise to much discussion. Bramwell, B., in *Burroughes v. Bayne*, 5 H. & N., p. 308, says: "I think if anything was necessary to shew the impolicy of this form of action (trover), and of using words in any other than their primary signification, it would be the difference of opinion which has arisen as to the meaning of the term conversion. It seems to me that, after all, no one can undertake to define what a conversion is. Some decided cases may enable one to come to a conclusion, but in cases not similar there will always be a difficulty."

Kelly, C. B., said: "It is true that a conversion has been correctly defined to be the exercising dominion over property inconsistent with the title of the owner. But justice, expediency, public policy, and common sense, have introduced exceptions or qualifications to this doctrine."

There can be no doubt that a proper demand and an absolute refusal is evidence of a conversion. In the case now under judgment there is some evidence of some kind of a demand made by the plaintiff upon the defendants' agent at Prescott on the 1st of August. That agent had not the pork under his charge then or there. The plaintiff well knew that his pork was then at Ottawa in custody of the defendants' officers there, and it is far from being clear what was the nature of the demand, or in what terms it was couched. Looking at what really did take place from the plaintiff's own evidence, it seems to me the demand upon the agent was (as he, the plaintiff, failed in getting Bate & Co. to receive the pork) to return the pork to Prescott.

The plaintiff's repeated expressions during the negotiations with Bate & Co. and the defendants' agent, that he wanted it back to Prescott, go far to shew and explain the nature of his alleged demand on the 8th of August. Any

other demand seems to me to be quite inconsistent with the plaintiff's conduct at the time of the demand, such as requesting the same agent to telegraph Bate & Co. at Ottawa to receive the pork, &c., as well as sending his (the plaintiff's) own agent the following day to Ottawa to see the condition of the pork. But I may here remark that while he says he made a demand, he does not state that the agent Jones refused to comply with his demand, and with regard to the freight agent, Taylor, there is no evidence of any particular demand made upon him. I may here remark that both of these agents swore positively that no demand was ever made on the occasion.

The circumstances attending the whole transaction, from first to last, clearly shew to my mind that the defendants or their agents asserted no right against the plaintiff's ownership, or exercised any dominion over the plaintiff's goods, or did anything with intent to exercise dominion inconsistent with the right of property in the plaintiff.

I will briefly refer to the findings of the jury. Some thirteen questions were put to the jury by the learned Judge, and answered. There are only two of them, however, having any important bearing upon the questions before us, viz., the 7th and 13th, the former being, "Was there a demand made by the plaintiff for the pork when he was at Prescott on the 8th and 9th?" Answer. "Yes, there was a demand for pork, as sworn to by him." The thirteenth, "Have the defendants done any thing to assert, or have they asserted, any right in the pork inconsistent with the plaintiff's ownership of it?" Answer. "Yes, by removing the pork from Prescott to Ottawa."

Neither of these answers, when we take them in connection with the evidence, entitled the plaintiff to a verdict. The 7th answer does not indicate the nature of the demand, and there is no finding that there was any refusal to comply with the demand. The 13th answer only finds the asportation to Ottawa.

I cannot refrain from remarking that the plaintiff in his dealing with the defendants' agent acted disingenuously.

He apparently had a settled conviction in his mind, or was so advised, that the removal of the pork to Ottawa from Prescott by itself rendered some of the parties liable to him for the value of the pork ; and after failing to induce Bate & Co. to receive the pork, it is quite apparent his object was not to repossess himself of the pork, but to insist upon being paid its value, for after the alleged demand, when the pork was brought back to Prescott in reply to the telegram of the 23rd of August, requesting orders for its disposal, he replies that as he was dispossessed of the pork on the 20th of July (the day it was received and sent to Ottawa), the Great Western Company (the original shippers) must pay him for the pork ; and it appeared that for that purpose he brought a suit against that company, and then several months after the 23rd August, when he was offered his pork at Prescott, without any further communication or renewed demand, he brings this action.

Now, assuming that the plaintiff had shewn a proper demand and absolute refusal on the 8th of August, the subsequent offer and request for his orders for the disposal of his pork, it would seem, upon the authority of *Hayward v. Seaward*, 1 Moo. & Sc. 459, that the plaintiff could not maintain trover under such circumstances, upon the ground that there was no conversion. In that case, after a demand and refusal, the defendant before action informed the plaintiff he might at any time take away the chattel in question. Tindal, C. J., in refusing a rule to set aside the verdict for the defendant said, at p. 461 : "After that, it seems to me to be impossible to say that there has been any conversion." Alderson, J., saying, "The refusal in this case was cured by the offer subsequently made, but before the issuing of the writ, to restore the boiler."

On the whole, we are of opinion this appeal should be dismissed, with costs.

MOSS, C.J.A., BURTON and PATTERSON, J.J.A., concurred.

Appeal dismissed.

WILSON V. WILSON.

Interpleader—New trial after payment of money by sheriff.

The execution creditor declining to admit the *bona fides* of a mortgage under which the property in question was claimed, an issue was directed by the Court of Chancery, and was drawn up for trial before the County Court Judge. At the trial the good faith of the claimant was admitted, and the attack on the mortgage was confined to points of law, when a formal verdict was entered for the claimant, which was afterwards set aside in term by the County Court Judge, and a verdict entered for the execution creditor. The execution creditor, thereupon, applied to the Referee in Chambers for the usual order to enable him to obtain the money, which was opposed on the ground that the Court of Queen's Bench had since decided against similar objections to this mortgage, (42 U. C. R. 329), but the referee made the order as asked and directed the money to be paid to the execution creditor. An appeal against this order was dismissed by the Court of Chancery on rehearing, but the claimant had leave to apply within a month for a new trial of the issue before a jury, which was subsequently granted; but before the order was made the sheriff, with whom the money remained, had paid it over in accordance with the order of the referee.

Held, reversing the order of the Court of Chancery, that the Court had no jurisdiction in the matter after the payment over of the money.

Per PATTERSON, J. A.—In the absence of an express direction by the Court of Chancery, an interpleader issue sent from that Court may be tried before a Judge without a jury.

This was an appeal from an order made by Proudfoot, V. C., directing a new trial of an interpleader issue. The facts are fully stated in the judgment.

The case was argued on the 20th November, 1878 (*a*).

J. A. Donovan, for the appellant. The claimant was guilty of gross laches in having waited from the 26th October, 1877, until the 1st October, 1878, before moving for a new trial; and the execution creditor's position towards her execution debtors having in the meanwhile been altered, it is unjust to her and to them to grant such re-trial now. Since the entry of the verdict for the execution creditor, the equities reserved upon the trial of the issue have been disposed of by the order of the Referee in Chambers, dated 29th April, 1878, and the Sheriff, in obedience thereto, has paid to the execution creditor, in satisfaction of her executions, the money made by him, and has returned the writs satisfied; moreover, the writs have since ex-

(*a*) *Present*.—Moss, C.J.A., BURTON, PATTERSON, and MORRISON, J.J.A.

pired. The execution creditor has no further claim upon the execution debtors in respect of the debts in question, and cannot issue fresh executions against them therefor, so that the effect of the order is, to inflict upon the execution creditor the loss of her debts, without any reason. Nor can the execution creditor now be restored to her former position, having valid debts against the execution debtors and valid executions in force for their recovery. The chattel mortgage under which the claimant claimed the execution debtors' goods expired on 29th January, 1878, and the presumption is, that the claimant was not damnified in respect of his endorsement for the execution debtors, and consequently he has no claim whatever to the proceeds of the goods sold by the Sheriff to satisfy the execution creditor's executions. It is too late to obtain a new trial after the equities reserved upon the trial of the issue have been disposed of, unless such a case is made as would justify a bill of review: *Attorney-General v. Montgomery*, 2 Atk. 319; *Richardson v. Shaw*, 6 P. R. 296. The only reason alleged for a re-trial in this case is because another Court, with equal jurisdiction in the premises, interpreted an obscure instrument differently, which is clearly insufficient: *Craig v. Phillips*, L. R. 7 Ch. D. 249; *In Re Printing and Numerical Registering Co.* L. R. 8 Ch. D. 538. As a matter of discretion a new trial ought not to have been granted, on account of the small amount involved: *Gourlay v. Ingram*, 2 Chy. Ch. 309. Effect ought to have been given to the objection of the execution creditor's counsel at the hearing of the motion, that the Sheriff of the county of York should have been served with notice of the motion, he having been a party to the order of the 9th April, 1878, The defendants in the suit of *Wilson v. Wilson*—who are the execution debtors—ought also to have been served with notice of the claimant's motion for a re-trial, because if the execution creditor is deprived of the fruits of her executions, the Court should re-instate her in her former position, and revive her debts against the execution debtors.

Fitzgerald, Q. C., and *J. O'Donohoe* for the respondent. The Vice-Chancellor was right in referring the issue back to the County Court, inasmuch as there was no proper trial of it. The learned Judge of the County Court who tried the issue had no jurisdiction to try it without a jury. But having tried the issue at the sittings of the County Court of the County of York, and having found a verdict for the claimant, and endorsed the verdict on the issue, (assuming he could have tried the same without a jury) he had no power to interfere with his finding, but should have transmitted it forthwith to the Court of Chancery: R. S. O. ch. 40, sec. 99. The acts of the learned Judge were *ultra vires* and a nullity, inasmuch as he found in favour of the claimant on the question of fact, and he had no power to consider the legal rights of the parties, but should have merely reported the facts and have left the question of law to be disposed of by the Court of Chancery: *Attorney General v. Lord Hotham*, T. & R. 209, 3 Russ., 415. That the Court of Chancery, in directing the issue, intended that the County Court should only try the question of fact is obvious, as it could have adjudicated upon the legal rights of the parties without directing the issue. The judgment of the Court, as entered in term, was clearly erroneous in law as is shewn by *O'Donohoe v. Wilson*, 42 U. C. R. 329, in which the validity of the identical chattel mortgage in question herein was determined. The claimant has been guilty of no laches except in treating the action of the County Court as a nullity. He resisted the application made by the execution creditor to the Referee in Chambers, on which the order dated the 29th April, 1878, was made, and the Referee having decided against him appealed to Vice-Chancellor Proudfoot in Chambers, and from his order, affirming that of the Referee, to the full Court. In any event the order of the full Court dated 5th September, 1878, granted leave to the claimant to make application for the order appealed from, and the execution creditor having submitted to such order, cannot now be permitted to speak of laches. The execution creditor's position has in no way been

altered so as to affect the issue herein, the only question being whether the claimant had a *bonâ fide* claim as mortgagee of the said goods; but in any event this Court should not uphold a judgment so unjust in its consequences to the claimant, and the execution creditor should have taken the objection when the order for leave to move for a new trial was made. The execution creditor will have her full rights against her judgment creditors for the amount of her execution, even should the issue be found against her, and she is directed to refund the amount received. The fact of the chattel mortgage having expired has no bearing on the present appeal, even though it were shewn it had expired, which is not done. The Court of Chancery has exercised its discretion by ordering a new trial, and the Court should not interfere: R. S. O. ch. 38, sec. 18, sub-sec. 3. There was no necessity that the Sheriff and the judgment debtors should have been before the Court, as no order need be made against the Sheriff, and the judgment debtors are in no way interested in, and have not been parties to, the issue or subsequent proceedings.

6th December, 1878. (α) Moss, C.J.A.—It is impossible to suppress a feeling of regret and surprise that there should have been such protracted and expensive litigation in a case where the amount at stake was so insignificant. It all originated in a seizure of a piano by the sheriff to satisfy two small executions issued for interlocutory costs. The executions were in favour of the plaintiff, and were for \$29.60 and \$18.70. The chattel having been claimed by Mr. O'Donohoe, under a mortgage made to secure him against the indorsement of a promissory note, the sheriff applied to the Court of Chancery, out of which the executions had issued, for an interpleader order. Although it would appear from the course of the subsequent proceedings that there was no real question of fact between the parties, they were directed to proceed to the trial of an issue "in the county Court of the county of York," at its next sittings.

(α) *Present.*—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

It is said, and I presume correctly, that this direction was given, because the execution creditor declined to admit the *bona fides* of the mortgage transaction. Shortly afterwards an issue was prepared by the claimant, and concurred in by the execution creditor, in which it was provided that the trial should be by "the Judge of the County Court."

At the sittings of the Court held in September, 1877, for the trial of non-jury cases, the issue came on for trial in the presence of counsel for both parties, when it appearing that there was no question of fact, inasmuch as the good faith of Mr. O'Donohoe was not impeached, and the attack upon the validity of the mortgage was limited to defects in its form and accompanying affidavit, the learned Judge entered a formal verdict for the claimant, and reserved leave to the defendant to move against it in the following Term. Accordingly a rule *nisi* was obtained, and after argument made absolute, the learned Judge being of opinion that the affidavit did not satisfy the requirements of the statute respecting chattel mortgages. Although up to this point this course of procedure seems to have been acquiesced in by both parties, it is not supposable that it was within the contemplation of the Court of Chancery when ordering the trial of an issue. It certainly never intended to seek the opinion of the learned Judge upon a mere legal question. The rule was made absolute on the 26th of October, 1877, but no step (except perhaps some proceedings towards an appeal) seems to have been taken until the middle of April, when the execution creditor served the claimant with notice of an application to the Referee in Chambers for the usual order made against an unsuccessful claimant. Upon the hearing of this motion, the execution creditor relied upon the proceedings in the County Court, and proved that the claimant had given notice of appeal from the decision of that Court, and had an appeal book prepared and delivered to the Registrar, but had not prosecuted the appeal. The claimant proved that upon the same questions as to the mortgage being raised upon an issue in

the Court of Queen's Bench, that Court had pronounced in favour of its validity.

On the 29th of April, 1878, the usual order was made by the Referee in Chambers, directing the sheriff to pay to the execution creditor, out of the moneys which had been deposited with him by the claimant to prevent a sale of the property seized, the amount of his execution, together with various costs, which it is to be feared amount to a considerable sum.

An appeal against this order having been unsuccessfully made to a single Judge, the claimant went to a re-hearing on the 5th of September, when the Court affirmed the order with costs, but gave the claimant liberty, if he were so advised, upon payment of certain costs, to apply within a month for a new trial of the interpleader issue directed by the original order.

The claimant did apply, and on the 1st of October, the order appealed against was made. But the claimant had taken no step to stay the proceedings under the order of the Referee, or otherwise to guard the sheriff from paying over the money to the execution creditor.

The consequence was, that, during the progress of this arduous struggle, the sheriff, in entire good faith, paid over the moneys to the execution creditor, and returned the executions as satisfied. After this it appears to me that a new trial would be useless and futile. The issue was to try whether at the time of the seizure of the said goods and chattels by the sheriff the said goods, or any part thereof, were the property of the claimant as against the execution creditor. Suppose a verdict were to be found for the claimant in the County Court, what would be the result? The Court, it appears to me, would be quite powerless to aid the claimant. In fact it no longer possesses jurisdiction, for that was altogether founded upon the statutory right of the sheriff to seek protection. As incidental to the function of keeping him harmless, the Court decides upon the ownership of the goods, or their proceeds, if they are sold. Here the claimant, instead of paying the amount of the

executions into Court, as he was authorized by the order to do, deposited it with the sheriff. This money was the subject matter of the controversy, and could have been dealt with by the Court while it remained in the control of its officer. But now that it has been paid over, by whom can the Court order it to be paid to the claimant? Not by the sheriff, for he rightfully and innocently paid it over in obedience to an order of the Court. Not by the execution creditor, whose executions have been returned satisfied, and cannot be replaced in their former position.

This opinion does not in any manner conflict with the well established rule of equity practice, that where the Court thinks fits to send an issue of fact to be tried by a jury, an application for a new trial must be made to the Court itself, and not to a Court of law. The verdict is viewed as a means of informing the conscience of the Court, and it is the appropriate and only tribunal to examine the correctness of the jury's conclusion. I rest my judgment solely upon the ground that the jurisdiction ceased upon the payment of the money by the sheriff.

PATTERSON, J. A.—The plaintiff had a *fi. fa.* against the defendants, upon which the sheriff seized goods, which were claimed by Mr. O'Donohoe under a chattel mortgage made to him by the defendants to secure him as indorser of a promissory note for their accommodation.

Upon the sheriff's application an interpleader order was made, which directed that the sheriff should (in the event which happened) make the money and pay it into Court; and that an issue should be tried in the County Court respecting the property in the goods.

The order followed the form usual in Common Law cases under the Interpleader Act, which is now R. S. O., ch. 54.

This Act does not mention the Court of Chancery, nor profess to regulate issues out of that Court; but its provisions have become part of the procedure of that Court by the effect of the law contained in sec. 19 of the C. S. U. C. ch. 24, and now sec. 72 of the R. S. O. ch. 66,

which places writs of *fi. fa.* issuing from Common Law Courts and from Chancery on the same footing with respect (amongst other things) to the rights and remedies of the sheriff. See *Gourlay v. Ingram*, 2 Chy. Ch. 309.

By sec. 99 of the Act respecting the Court of Chancery, R. S. O. ch. 40, (C. S. U. C. ch. 12, sec. 69) a simpler proceeding can be adopted in Chancery than that in use at Common Law; as in any case in which the Court requires an issue to be tried by a jury, it is made sufficient to enter for trial an office copy of the order directing the issue, in the same manner as a *nisi prius* record is entered.

In the case before us this simple practice was not adopted, but a formal issue was prepared; and it was prepared for a trial, not by a jury, nor by the County Court, but by *the Judge* of the County Court.

This issue was carried down to trial before the Judge without a jury, when his Honour formally entered a verdict for the claimant, reserving leave to the execution plaintiff to move to enter a verdict for her. A rule *nisi* was accordingly obtained, and after discussion of the matter, was made absolute.

The Judge, on the 19th of May, 1877, certified the result of these proceedings to the Court of Chancery.

In accordance with his ultimate finding, an order was made on the 29th of April, 1878, by the Referee in Chambers, directing the sheriff (who seems to have retained the money in his hands instead of paying it into Court,) to pay the money made under the *fi. fa.* to the execution plaintiff; and he paid it over in obedience to that order.

The claimant appealed from the order of the Referee to one of the Vice-Chancellors, who affirmed the order, and his judgment was affirmed on re-hearing on 5th September, 1878.

The order made on the re-hearing, while affirming the order of the Referee, gave leave to the claimant, on payment of the costs, to apply within a month for a new trial of the issue.

An application was accordingly made. In answer to it

the fact was shewn that the money, the subject of the interpleader proceedings, had been paid over under the order of 20th April, affirmed as I have mentioned. An order was nevertheless made on the 1st October, for a new trial of the issue by a jury. From that order the plaintiff has appealed to this Court.

One fact more ought to be stated. On the trial in the County Court, it appeared that the only question really in contest was the validity of the chattel mortgage under the provisions of the Chattel Mortgage Act, a question entirely of law. No charge of *mala fides* or other question of fact was insisted on. That question of law is what would have to be tried, and all that would have to be tried, if the issue were now sent to the jury.

The claimant has reason to suppose that that question would be decided in his favour, because the same mortgage is said to have been held valid by one of the Superior Courts of Common Law, in December, 1877, which was after the decision of the Judge of the County Court, but four months before the order of 29th April, 1878.

A doubt was expressed by the present Chancellor, in *Gourlay v. Ingram*, 2 Chy. Ch. 238, and by Mowat, V. C., in the same case (*Ib.* p. 310), whether the Court had jurisdiction to decide questions arising on claims to goods seized in execution, without a jury, as the jurisdiction depended entirely on statutory enactments.

I think those doubts were expressed before the Law Reform Act of 1868 gave power to try issues of fact at Common Law without juries. I may be mistaken in this, because the report does not give us the date of the decision. It was only respecting the decision of questions of fact that any doubt existed. Questions of law arising on interpleader issues, were always decided by the Court of Chancery itself just as they were decided by the Common Law Courts in *banc*, as in *Walker v. Niles*, 18 Gr. 210.

At present there is no doubt of the power of Common Law Courts to try interpleader issues without the intervention of a jury; and there is nothing which, in the

absence of an express direction by the Court of Chancery, requires an issue sent from that Court to be dealt with differently from a similar issue from a Court of law.

There is therefore no force in the objection that the trial was before the Judge without a jury, even if the claimant who prepared the issue could be allowed to urge it.

There is, if possible, still less ground for the contention that the Judge could not change the formal verdict for the claimant into a verdict for the execution plaintiff.

Neither of these points is properly before us, because the Court below disposed of them against the appellant by the order on re-hearing, and there is no appeal from that order.

The County Judge's reservation of the consideration of the matter until the sitting of his Court in term, which was in effect what was done, made the final decision at once that of the Judge and of the Court, and so fitted either the interpleader order which spoke of the Court, or the issue which confided the investigation to the Judge.

But it is further urged that the granting of a new trial is a matter so purely discretionary that it is not a subject for review in appeal.

I do not question for a moment the right of the Court to grant a new trial for the purpose of better elucidating the merits of any matter in controversy before it. "In granting it, the Courts know no limitation other than that which is prescribed by public policy, as defined by the established practice of the Court." (*Lush's Practice*, 3rd ed., 629.) In certain cases, viz., where a new trial is granted or refused upon matter of discretion only, as on the ground that the verdict is against the weight of evidence or otherwise, no appeal is allowed: R. S. O., ch. 38, sec. 18. And even in cases which do not come within the terms of this prohibition, we should hesitate before interfering with the discretionary power of the Court.

In the case before us the statutory prohibition clearly does not apply, for there is no suggestion that upon a second trial a state of facts would be made to appear differing in any respect from those formerly before the

Court. The whole dispute is upon the application of the law to facts which are not disputed.

It may sometimes become necessary to inquire at what point in a particular case the line which separates discretion from principle is to be found. A recent instance of this is the case of *Allhusen v. Labouchere*, L. R. 3 Q. B. Div. 654, in which the Court of Appeal discharged an order of the Queen's Bench Division dismissing a motion for the allowance of interrogatories.

There are one or two circumstances which would call for discussion if we had to bring the order now in appeal to this test.

There is the fact, which cannot have been brought to the notice of the learned Vice Chancellor when the order for a trial by a jury was asked for, that the only question is one of law. There is the other fact that more than sixteen months had elapsed from the rendering of the verdict before the application for a new trial, which raises the inquiry whether there has not been a transgression of the limitation mentioned in the words of Mr. Justice Lush, which I have just quoted; and something might turn on the smallness of the amount about which all this litigation has been indulged in.

We are not driven to discuss these questions, because the peculiarity of this case is that the subject matter of the controversy has disappeared.

The proceeding by interpleader was at the instance of the sheriff, and to protect him from the rival claimants of the goods he had seized or the money he had made.

He made the money as directed by the interpleader order, which order protected him from any action for the seizure; and now he has, in obedience to another order of the Court, paid over the money to one of the parties.

The proceeding is not a step in the suit of *Wilson v. Wilson*, though it arises from what has been done under the *fi. fa.* issued in that cause. The claimant of the goods is not a party to that suit, neither is the sheriff. They are merely parties to the collateral proceeding authorized by

statute for the protection of the sheriff. The claimant, whose remedy would otherwise have been against the sheriff personally, has had to forego that remedy and content himself with pursuing the money; but it has gone. The sheriff is no longer interested; the subject of the contest is no longer before the Court; and the execution has been satisfied. If the new trial should take place and a verdict be rendered for the claimant and upheld by the Court, what is then to happen? Is the order of 29th April to be vacated, and if so, how is the money to be got back?

As pointed out by Mowat, V. C., in the case to which I have already referred, the jurisdiction of the Court is entirely statutory. And see *Slingsby v. Boulton*, 1 V. & B. 334; *McLaughlin v. McLaughlin*, 15 C. P. 182. The object of the Statute had been accomplished when the order of 29th April was affirmed and acted on. No complaint is now made of that order, or of the action of the Court in affirming it; and the order for a new trial is consequently in a matter *coram non judice*.

Our only course is to allow this appeal. The order for a new trial should be discharged, and the appellant should pay the respondent her costs of opposing that order, and the costs of this appeal.

BURTON and MORRISON, JJ.A., concurred.

Appeal allowed.

Con. 16 A.R. 52.

GEAUYEAU V. GREAT WESTERN RAILWAY COMPANY.

Railway terminus—Land conveyed on condition.

The plaintiff, on the representation of parties that they had given land to the defendants for the purpose of having the terminus of their railway at Windsor, conveyed lot 83 to the defendants in 1847, expressing in the conveyance that the same had been selected by the company "for the purpose of establishing the western terminus of their road thereon, * * and the execution of which condition constituted the sole consideration for this grant." When the plaintiff made this deed he knew that one H. had conveyed the adjoining lot 84 to the defendants on substantially the same condition. In 1853, the defendants built a passenger station on lot 83, and a freight house partly on lots 83 and 84, which were destroyed by fire, and a passenger station was afterwards built on lots 83 and 84, and a freight station on lot 84, which the defendants continued to use until recently, when they built a passenger station about half a mile from the original one. The bill alleged that the western terminus had been removed to the City of Detroit, and sought to restrain such removal from the land in question. It appeared that instead of unloading the passengers and freight in Windsor, the cars were carried across the Detroit river on ferry boats, where they were taken charge of by the companies over whose line they were to go; but that the terminus of the defendants was still at Windsor. It was also shewn that the business of the defendants could not be conducted on so small a space as lot 83, and that the buildings on lots 83 and 84 were used for freight.

Held, reversing the decree of Spragge, C., that the terminus and depot were not confined to buildings alone, but extended to the whole premises necessary for conducting the business of a terminus, and that upon the true construction of the deed the plaintiff was only entitled to have lot 83 included in the terminus, and had no right to have all the buildings or any particular building on lot 83.

Per PATTERSON, J. A.—That even if the deed were read as requiring the establishment of buildings on the lot in question, that duty had been sufficiently complied with by their erection.

This was an appeal from the decree of Spragge, C., reported 25 Gr. 62. The pleadings and facts are stated there, and in the judgments on this appeal.

The appeal was argued on the 6th March, 1878 (a).

Boyd, Q. C., for the appellants. The decree is not warranted by the pleadings and evidence, and deals with the rights of the defendants in land conveyed by Hall, who does not complain and is not before the Court. It in effect attempts to specifically enforce an agreement not susceptible of specific performance, and it also seeks to enforce a forfeiture contrary to the practice of the Court: *Story's Eq. Jur.*, 6th ed., sec. 1319. In view of the facts

(a) *Present*.—MOSS, C.J.A., PATTERSON and MORRISON, J.J.A., and BLAKE, V.C.

and circumstances of this case, the proper construction of the deed in question does not involve the divesting of the land as upon a condition broken. The selection of the premises in question for the terminus and depot of the defendants does not involve the erection and maintenance of the buildings and conveniences indicated in the decree, and there was no evidence to warrant the giving of the directions therein contained. If, however, the deed was upon a condition, then the evidence shows that the condition was complied with by the action of the defendants after the conveyance was made, and their subsequent change of policy arising from increase of business, and otherwise, which occasioned a change in the occupation of the buildings on the premises in question, should not work a forfeiture. Such a condition cannot be apportioned, and the conveyance by the plaintiff of portions of the premises, both prior and subsequent to the conveyance to the defendants, disables him from seeking to enforce such a condition: *Tinkham v. Erie Railroad Company*, 53 Barb. 393. The offices and buildings connected with the terminal depot of the defendants necessarily occupy a large extent of land, and the lands of the plaintiff and Hall were and are insufficient therefor. The evidence shews that the plaintiff never asked or required the defendants, nor did the defendants ever undertake to place the chief buildings, or any particular buildings, upon the premises conveyed by the plaintiff. He cited 1 Wms. Saunders, 288 (d); *Twynam v. Pickard*, 2 B. & Ald. 105; *Wright v. Burroughes*, 3 C. B. 685; 1 Shep. Touch. 157; *Smith on Real Property*, 75; *Rice v. Boston & Worcester Railway Co.*, 12 Allan 141; *Hooper v. Cummings*, 45 Me. 359; *Pennsylvania Railroad Co. v. Parke*, 42 Penn., 31; *Cruise's Digest* Vol. 2, p. 36.

Bethune, Q. C. (*C. Moss* with him), for the respondents. The evidence abundantly sustains the decree pronounced. The condition upon which the appellants accepted the grant of the lands conveyed to them by the respondent was that the appellants should establish and maintain

thereon the western terminus and depot of their railroad, and the relief sought by the respondent in the Court below was a performance of the condition, or a declaration that by reason of breaches thereof the appellants had forfeited their right and title to the lands in question. The decree does not in any way affect or disturb the title of the appellants to lands not granted to them by the respondent. The first declaration of the decree is merely assertive of what the respondent was justified in believing himself entitled to claim by way of a performance of the condition contained in his grant to the appellants. At any rate, if the appellants considered that the decree should not have referred to the lands conveyed to them by Hall, they should have applied to correct it by motion to vary the minutes of the decree, which they did not do. The agreement between the appellants and respondent, set forth in the grant and proved at the trial of the cause, is clearly susceptible of specific performance, and even if it should appear that the Court of Chancery would not now enforce a forfeiture, a specific performance of the agreement by the appellants should be decreed. By the A. J. Act, 1873, the Court of Chancery is endowed with the same powers as a Court of Law to enforce a forfeiture, and no objection to a suit in Chancery on the ground that the subject matter thereof is exclusively or properly cognizable in a Court of Law is now allowable. The evidence shows that the appellants have neglected and failed to perform and keep the agreement and condition upon which they accepted the grant from the respondent. It appears that the appellants have now established their western terminus and depot at the city of Detroit, and that for a long time before and after the filing of the respondent's bill of complaint they made no attempt to use the lands granted to them by the respondent as the western terminus and depot of their road. Moreover, the evidence further establishes that even at the time of the trial of the cause the appellants were not *bona fide* using the lands as the western terminus and depot of their road. They referred to *Dayton*

Railroad Co. v. Lewton, 20 Ohio 401; *Lytton v. The Great Northern R. W. Co.*, 2 K. & J. 394; *Storer v. The Great Western R. W. Co.*, 2 Y. & C., 48; *Saunders v. The Great Western R. W. Co.*, 11 Beav. 499; *Wilson v. Furness R. W. Co.*, L. R. 9 Eq. 33; *Hood v. North Eastern R. W. Co.*, L. R. 5 Ch. 527; *Raphael v. The Thames Valley R. W. Co.*, L. R. 2 Ch. 147.

December 6, 1878. (a) PATTERSON, J. A.—The bill sets out that on the 1st November, 1847, the plaintiff was owner in fee of, or otherwise well and sufficiently entitled to lot 83, and by deed, dated the 1st of November, 1847, granted the entire front of the lot to the defendants, for the purpose of establishing thereon the western terminus and depot of their railway: that the true and only consideration to the plaintiff for the execution of the deed was the condition and stipulation on the part of the defendants that they would establish their western terminus and depot on the land conveyed to them: that the defendants accepted the land on that condition and entered into possession thereof, and erected a passenger station, and established their western terminus and depot thereon, and for many years continued to use the said parcel of land, and *the fronts of the adjoining lots*, for the purposes aforesaid.

It then complains, in the sixth paragraph, that lately the defendants have removed their western terminus and depot to and established the same at Detroit, in the United States of America, upon the opposite side of the River Detroit from the said parcel of land, and by means of ferry boats convey their passenger and freight cars, and the passengers and freight therein, from a point east of and far removed from the said parcel of land to the said City of Detroit, and have altogether ceased to use the land as the western terminus and depot of their railroad.

The plaintiff-alleges that before he made his deed it had been represented to him, by and on behalf of the defendants, that if he would make a gift of the land to the defendants

(a) *Present*.—MOSS, C.J.A., PATTERSON and MORRISON, J.J.A., and BLAKE, V.C.

they would establish their western terminus and depot upon it, and by reason thereof a large traffic would be created, and many persons employed by the defendants, and that thereby the rest of the plaintiff's property would be much enhanced; and that by the removal of the terminus and depot the traffic thereby created has been diverted to Detroit and elsewhere, and that large numbers of persons employed by the defendants in and about their terminus and depot have been obliged to remove to Detroit and elsewhere, and have been thrown out of employment; and in consequence thereof the trade, business, and convenience occasioned by the terminus and depot having been located at the said parcel of land has been seriously affected and diminished, and the value of the plaintiff's *and other property in the neighbourhood* greatly decreased.

The eighth paragraph alleges that the plaintiff had made frequent application to the defendants to refrain from the acts aforesaid, and to continue to use the said parcel of land for their western terminus and depot, but the defendants have neglected and refused so to do, and threaten and intend, and will, unless restrained by injunction, *continue to maintain their said western terminus and depot at the said city of Detroit.*

And he asks for specific performance of the condition, or that the land may be declared forfeited by reason of the breach of it.

In his evidence the plaintiff states that persons, some of whom he names, urged him to give the land to the railway company, representing to him that they had given land, and that having the station there, rather than somewhere else, would be a great advantage to the plaintiff for the sale of lots; that the railway company would have to buy lots for their shops. They led him to believe that the shops would be built on the land in the neighbourhood; not necessarily on his land. One of the persons was Mr. Hall, who stated that he had given land for the same purpose that the plaintiff's land was wanted for. It was, as the plaintiff says, a great point to keep the terminus of the railway at Windsor, instead of its being at Sandwich.

The plaintiff made a deed to the defendants on the first of November, 1847, of the entire front of lot 83, "being between the travelled road and the channel bank of the Detroit River, the same having been selected by the said company for the purpose of establishing the western terminus and depot of their road thereon, and the execution of which condition constitutes the real consideration for this grant."

On the second day of November, 1847, Mr. Hall conveyed the front of the adjoining lot 84, by a deed in which even stronger language was used, viz., "the same having been selected by the said company for the purpose of establishing the western terminus and depot of their road thereon, upon the express and absolute condition, to wit, that said premises are to be occupied for the purposes above stated, and the execution of which condition constitutes the real consideration for this grant."

Lot 84 is east of lot 83.

The evidence shews that the railway ran across lot 83, and 140 feet on lot 82. A passenger station was built in 1852 or 1853 on lot 83, and a freight house partly on 83 and partly on 84. These buildings were destroyed by fire a number of years ago, and then a passenger station was built in 1857, partly on 83, and extending across 140 feet of lot 82 to Ferry Street. It is called Ferry Street Station. A freight house was also built at an earlier date than 1857, as I understand the evidence. No part of it is on 83. It is on 84, and apparently on 85 also. These buildings are still there, but of late years a change has taken place in the mode of communication with Detroit. In place of passengers for the United States leaving the cars at Windsor and crossing by the ordinary ferry to Detroit, and freight being unladen at Windsor before being carried across the river, the defendants have ferry boats which carry the passenger cars and the freight cars across to Detroit, where they are taken charge of by the American railway companies over whose lines they are to go. These ferry boats start from a slip some distance to the east of lot 84, and

besides this the defendants have within two or three years established a new passenger station still further east, and about half a mile from the original one.

The buildings on lots 85, 84, 83, and 82, are still used for freight, but the new passenger station has superseded the old one as the passenger station.

Upon these leading facts let us see what is really the plaintiff's complaint.

It is the traffic with Detroit, by means of the ferry boats of the defendants, of which he complains.

The bill does not contain a word about the new passenger station, nor a word which can be taken to refer even indirectly to it.

The only reference to works at any point east of lot 83 is in the sixth paragraph, which complains of the conveyance of passenger and freight cars from a point east of lot 83; but that point is west of the new station; and the complaint would obviously be as well founded if the ferry slip had been on lot 83 itself. It is the establishment of the ferry, and not the site of it, which is the grievance.

This is clear from the allegation in paragraph 8, "that unless restrained by injunction the defendants will continue to maintain their western terminus and depot at Detroit." as well as from the statements of paragraph 6.

I entirely agree with the learned Chancellor, that the defendants have not either actually or virtually removed the western terminus of their road to Detroit. The road ends in Windsor. The defendants have no railway at Detroit.

What is there then to support the plaintiff's bill?

The decree proceeds upon the right now asserted to have the passenger station on lot 83 instead of further east, though we look in vain through the bill for a complaint pointing with any distinctness to its removal to any place but Detroit.

The evidence fails in showing that the plaintiff loses by its removal any advantage that he looked for when he made the deed. The great object then was to keep the

terminus at Windsor. That has been secured and retained. The plaintiff expected workshops to be established, and hoped to sell land to the company for the purpose. That was no part of his contract. We are not told whether workshops were established as expected. I suppose they were not. But the plaintiff sold his land to others, and retained none in the vicinity of the railway.

He shews by one statement in his bill, and some of his witnesses make it more clear, that the interest of other persons is as much sought by this proceeding as that of the plaintiff.

Still, it is true that the bill may be read so as to cover the case of the passenger station; and the plaintiff has a right to a decree in respect of it if his contention can be sustained.

The defendants meet him with formidable objections.

Some of these relate to the remedy, and can only properly arise after we have determined what the bargain was, and that the defendants have broken it.

The defendants were to "establish the western terminus and depot of their road thereon," that is, literally, on the front of lot 83.

When the plaintiff made his bargain he knew that a similar one had been made with Hall as to lot 84.

Both these bargains could not have been literally carried out. If the terminus was on 84 the road could never have reached 83.

The plaintiff, however, understood "terminus" in a more technical and less literal sense. He never either admitted that the road ought to stop on 84, or complained of its running across 82 to Ferry Street.

The passenger station of 1857 fronts on Ferry Street. The witnesses all call it the Ferry Street Station. It is in a building 300 feet long, used partly for freight. Of the building 140 feet are on lot 82, and only the rear end on lot 83.

The freight house proper is not on 83 at all, but on and east of 84.

It seems therefore that, ever since the original buildings

were burned the plaintiff has been content that the passenger business should be transacted on lot 82, and the freight business on lot 84.

The language of the deed does not necessarily imply that the whole terminus and depot must be on lot 83.

It is shown to be impossible to conduct the business of the terminus in so small a space.

Mr. Dow, the station agent at Windsor, who was called as a witness by the plaintiff, stated that the depot extends from Ferry Street about a mile east, and that he has charge of the whole depot from one end to the other.

He evidently does not use the word depot as confined to a building, and I see nothing else in evidence to afford a key to the sense in which the word was used. It is true we constantly hear the word used as meaning a railway station, but I do not know that it is used as meaning any one particular building or part of a building at the station. People speak of going to the depot, and they expect when they arrive there to find a place where they can buy tickets. They would, no doubt, consider a depot incomplete if there was no such convenience there; and they would also think the depot defective if there was not some convenience for receiving freight. But neither the ticket office nor the freight house is the depot, as that word is popularly used. Both are included in its meaning; and I am not prepared to hold that its use is confined to buildings, or that Mr. Dow did not give it its actual popular signification when he applied it to the whole premises under his control as station master.

In a form of what is called in the report a bill of lading, and which is quoted at page 28 of the 22nd vol. of the American Reports, I notice the word used in this wide sense. "Received *at the depot* of the —— Railroad at —— the following packages." A description follows, including "1 car bulk corn."

"Terminus," which is not a word much used in the sense of station or depot, and which is used in the deed to express that the "depot" was to be at Windsor and not at

Sandwich, must be understood in the same sense as "depot" is understood by Mr. Dow.

Then if the whole terminus and depot need not be on lot 83, what basis have we for holding that any specific part or appurtenance must be upon it; or saying more than that lot 83 shall be included in the "terminus and depot." ?

The language used does not require such a decision; and we cannot reasonably be asked to find for the parties a meaning which they have not expressed, and which is not that indicated by their acts or acquiescence; and more particularly when the dispute, though now confined to the claims of lot 83, as against the other lots in the locality, really arose because through passengers and freight are carried across the river without changing conveyances, and not because Canadian passengers buy their tickets to the east of lot 83, instead of buying them to the west of it as they had done for some twenty years.

These considerations lead me to the conclusion that under the true construction of the deed the plaintiff could never have insisted on more than that the western terminus and depot should be established in good faith so as to include lot 83; and that was done, and has continued. I do not consider that he could at any time have maintained a right to have all the buildings, or to have any one particular building erected on the lot, if the terminus and depot could have been in good faith established so as to include that lot without placing such buildings upon it. It may be that in the infancy of the railway this was impossible; and possibly the anticipations of those concerned may not have contemplated such a growth of the volume of traffic as to make a much larger depot necessary. But such an increase has taken place as to make it occasionally difficult to work even with the present extended accommodation. The lot may in my opinion be a part of the depot as much as it ever was, even though not occupied by any of the buildings.

We are bound to construe this deed, as between the plaintiff and the defendants, without importing the transac-

tion with Hall into it. That transaction has been properly referred to, because the defendant himself shows that he knew of it when he agreed to give his land. But the two contracts are distinct. It is not one contract with the plaintiff and Hall to do certain things on lots 83 and 84. There are separate contracts to do on each lot exactly what is to be done on the other. We must, in construing the deed before us, look at it alone, though with the knowledge we have of the surrounding circumstances. Therefore we are bound to read it either literally as requiring the whole terminus and depot, whatever these words include, to be on lot 83, which I have endeavoured to show would not be correct, and which I do not understand to be contended for; or we must read it as requiring only that the lot shall be *bonâ fide* included in the terminus and depot. I see no warrant whatever for discovering a contract to place the whole on 83 and 84; or to place the whole on one or other of those lots, or to divide the buildings between those lots. There is no privity between Hall and the plaintiff in their contracts with the defendants, however useful we may find the knowledge each of them had of the other's bargain, in demonstrating that they did not use the words "establish the terminus and depot thereon," as meaning that no other place should partake of the character of terminus or depot.

I may add that while the words "*establish* the terminus and depot," are very appropriate to what is shewn to have been the design in using them, viz., to keep the terminus at Windsor, they are scarcely those that would have been chosen if the chief object was to secure the *erection* of certain buildings.

I am further of opinion, that even if we read the deed as requiring the "establishment" of buildings upon the lot, that duty has been fulfilled.

I do not stop to argue that the defendants had done all they were bound to do up to the time when they first decided to erect the eastern passenger station which is the subject of complaint, because I understand that no com-

plaint is made of any failure to perform on or in the immediate vicinity of lot 83, whatever ought to have been done there, if only the new ferry and the new station had never been heard of. From 1852 or 1854, until the new arrangements, the terminus and depot were "established," and there was nothing to complain of.

But we are asked to read "establish" as including "maintain and use for ever."

To do this would be adding to, not construing the words employed. We may speculate upon what the parties meant, or expected, or hoped, when they made their bargain. At this length of time, thirty years after the transaction; with the circumstances of the locality and of the province materially changed; with the railway, then only begun, now an enterprise of great magnitude; and with our own apprehensions affected by the material changes around us, any such speculations must be eminently unsafe. Yet in attempting to put ourselves in the place of the plaintiff in 1847, and to fancy what he may have had in his mind during the negotiation, we are not necessarily led to suppose that he must have contemplated the continued use of the land in the particular way for so long a period as thirty years. He tells us that he wanted to sell his land, and that he looked to the railway works as enhancing its value, and creating a demand for it as a marketable article. His hopes cannot have been very sanguine if he supposed any of it would remain unsold for thirty years. It is more likely that he looked for rapid sales.

We may, if we are to venture into the regions of conjecture, suppose that it had been proposed to the defendants that they should bind themselves never to build a station house or ticket office, or what ever may be fancied to be meant by depot, anywhere but on lot 83; and we can imagine the not unreasonable reply that they would not so bind the management of the road for all time; that their present intention was to establish the building on that spot; that nothing then made it probable they would

desire to change it; but that future exigencies must be met as they arose; and that the plaintiff must be content with the present establishment of it there, trusting that the interest of the defendants and the convenience of the public would lead to its being kept there; and therefore the contract must not extend beyond the obligation to establish it.

It is obvious that the safe rule, and one of which the parties cannot complain, is that which holds them to the direct force of the language they have used, without adding by construction what they could easily have expressed if it had been so understood or intended.

Two cases which have been referred to afford illustrations of the application of this rule, viz.: *Mead v. Ballard*, 7 Wall. 290; decided in 1868 by the Supreme Court of the United States. and *Wilson v. Northampton, &c., R. W. Co.*, L. R. 9 Ch. 279, decided in 1874.

In *Mead v. Ballard*, the Court having before it a deed conveying land "upon the express understanding and condition that the Lawrence Institute shall be permanently located upon the said lands, and on failure of such location being made on or before the 7th day of September, 1848, and on the repayment of the purchase money without interest, the said land shall revert to and become the property of said grantors," held that a building having been erected on the lands in pursuance of a resolution of the trustees of the Institute passed before September, 1848, the condition was satisfied, although the building was afterwards burned down and never rebuilt, and a larger building erected on another site. Something turned in that case on the limitation of time, which weakens the effect of the decision as one on a contract like the present.

In *Wilson v. Northampton, &c., R. W. Co.*, L. R. 9 Ch. 279, specific performance was asked of an agreement to "erect, set up, and construct a station," at a certain place. Vice-Chancellor Bacon had refused specific performance, but had directed an enquiry as to the damages for the refusal of the company to perform the contract. In giving the judgment

of himself and the Lord Justices James and Mellish, affirming the decree, Lord Selborne used language which is not inapposite in the present case. He said, at pp. 285-286, "It is suggested that an agreement to use the station must be implied, for that it could only have been intended to be erected with a view to use. That the company were expected to use it is very probable, but it is not so expressed; and the Court, if it attempted to impose on the company any thing like a definite obligation as to the use of the station, would not be executing the written agreement, but enlarging it. * * It has been a matter of some surprise to us that the plaintiff has not been satisfied with the (Vice-Chancellor's) conclusion; for if the view which has been already expressed is correct, supposing the Court had given him specific performance, it could not have extended the express obligation of the company, and therefore could only have given him the very minimum of that which is expressed in the terms creating the obligation. * * They (a jury) might take into account the reasonable probability that if the company had *bondâ fide* performed the agreement, they would have made the station in a reasonable manner as regards the mode of construction and the extent of accommodation; and they might also take into account the reasonable probability, that if the company had made the station, they would in their own interest have thought it worth while to make a reasonable use of it. All those are elements, no doubt more or less of an indefinite character, but proper for the consideration of a jury on the question of damages, and proper for the consideration of this Court when it discharges the functions of a jury."

It appears that the plaintiff's father had sold about 92 feet of the west part of lot 83 to one Gardiner, who owned it when the plaintiff made his deed to the defendants; and that the plaintiff himself sold to one Ouellette 96 feet off the east part. The whole width of the lot was 392 feet.

In 1852 Gardiner and Oulette's vendee conveyed to the defendants for valuable considerations by deeds, which

contained no reference to the use to be made of the land beyond the recital that it had been selected by the defendants for purposes connected with their road.

Now if the defendants had to erect any building on lot 83, they were not bound to erect it on any particular part of 83, or of any particular size. It might have been on the Gardiner part, or on the Ouellette part. The plaintiff could not insist on the building being placed on the 204 feet which passed under his deed to the defendants.

Arguments have been addressed to us founded on these sales to Gardiner and to Ouellette, as affecting the plaintiff's claim either for specific performance, or to re-enter by reason of the alleged failure to perform the condition, or pay the consideration, in whichever way the obligation as to the use of the land is regarded.

I do not propose to discuss these questions, as in my opinion the plaintiff fails to shew that the defendants have broken their bargain with him.

I think the appeal should be allowed with costs, and the bill dismissed, with costs.

BLAKE, V. C.—The instrument of the 1st of November, 1847, shews as the reason for the giving the land of the plaintiff to the defendants—"the same having been selected by the said company for the purpose of establishing the western terminus and depot of their road thereon." The injury complained of by the plaintiff is thus described in his bill :

Par. 6. "Lately the defendants have removed their western terminus and depot to and established the same at the City of Detroit, in the United States of America, upon the opposite side of the River Detroit, from the said parcel of land, and by means of ferry boats convey their passenger and freight cars, and the passengers and freight thereon, from a point east of and far removed from the said parcel of land to the said City of Detroit, and they have altogether ceased to use the said parcel of land as the western terminus and depot of their said road."

Par. 7. "In consequence thereof the trade, business, and convenience occasioned by the said terminus and depot having been located at the said parcel of land, has been seriously affected and diminished, and the value of the plaintiff's and other property in the neighbourhood greatly decreased.

Par. 8. "The plaintiff has made and caused to be made frequent applications to the defendants to refrain from the acts aforesaid, and to continue to use the said parcel of land for their western terminus and depot, but the defendants have neglected and refused so to do, and they threaten, and intend, and will, unless restrained by the order and injunction of this Court, continue to maintain their said western terminus and depot at the said City of Detroit."

The plaintiff, complaining of the act "lately" done, would seem thereby to admit that theretofore the defendants had complied with the condition on which he says he gave them the land. He knew that Hall had conveyed to the Great Western R. W. Company the adjoining lot on much the same terms. He knew that the depot could not be wholly located on the lands of either the one or the other of them, and he seems to have concluded that, so long as the western terminus and depot included his land, he had no right to demand that any particular building should be erected on his lot, or any particular part of the business of the railway should be thereon transacted. That which to-day forms the "western terminus" or depot of this road, now covers a mile of frontage on the river, in an easterly direction from Ferry Street, and it embraces the portion of the lot transferred by the plaintiff to the defendants. If the plaintiff intended not only that the "western terminus or depot," as these words are ordinarily understood in connection with railways, should include this property, but that this lot should be made the central point of the depot by the erection of a passenger, or freight, or ticket office thereon, or the putting up of an elevator, or the building of a wharf, then he should have stipulated for such buildings.

As he has not done so, I think all he can demand is, that this land should be used in connection with the other land which the railway may find it necessary to acquire for the purposes of a western terminus or depot—that he has no right to claim any particular consideration at the hands of the defendants, for a user of this lot which shall make the property of the plaintiff of a peculiar value. On the evidence the defendants appear to be using the lands for the purposes contemplated by the instrument under which they claim, and I do not think this Court has any right to interfere to prevent them so doing.

The “western terminus” of the Great Western Railway is now at a place in Windsor, which includes the lot in question. There is no other “western terminus” of this railway company. It is true they are from time to time making running arrangements further west, and are affording all the facilities in their power for the easy and expeditious transit of passengers and freight. It is almost absurd to argue that the wording of this instrument can control what the company are doing in this respect. If these demands by the travelling public are not as they arise answered by the defendants, their line will soon cease to exist and no use be found for a station at Windsor or elsewhere. It was not the intention of the parties, from anything that appears in this instrument or the evidence, to control the rights of the defendants in this respect. I am unable to come to the conclusion that the plaintiff has established any ground for relief. I think the bill should be dismissed with costs.

Moss, C. J. A.—I refrain from expressing any opinion as to the meaning of the word “establish” and desire to rest my judgment upon the conclusion that the terminus is upon land which includes the parcel obtained from the plaintiff.

MORRISON, J. A., concurred.

Appeal allowed.

TRUST AND LOAN COMPANY V. CLARKE ET AL.

Construction of deed—Life estate—Trust—Reformation of deed.

One C., a lawyer, mortgaged certain property to the plaintiffs. When searching the title to this property the plaintiffs' solicitor found that a deed, made in 1848 between C. and his mother, after reciting that C. was his father's executor, and that all the property was devised to him in trust for his mother for life, and after her decease in trust for his sisters, the defendants, and that he was indebted to the said trust fund in the sum of £1,200, and was "desirous of securing the same in accordance with the provisions of the said will," proceeded to grant the property in question "unto the said party of the second part," his mother, "forever." Upon inquiry by the plaintiffs' solicitor, C. informed him that the deed was only intended to convey a life estate to his mother, who was then dead. The plaintiffs having contracted to sell this property after C.'s death, an objection to the title was raised on account of the deed of 1848. Proceedings were thereupon taken to quiet the title, and the sisters were made claimants.

No evidence was given to shew what the real agreement between the parties to the deed was. One of the claimants swore that certain payments were made to her by C. after her mother's death, but her evidence failed to establish that the rents as such were paid to her.

Held, reversing the decree of PROUDFOOT, V.C., that under the operative words of the deed a life estate merely passed, and that their effect could not be enlarged by the covenants, which were in the short form.

Held, also, that although equity has ample power to supply words of inheritance, no case was established for the reformation of the deed.

Held, also, that even if the claimants' evidence had been satisfactory, being that of one of the litigants and uncorroborated, it could not be made the foundation of a decree after C.'s death; and, moreover, the claimants were volunteers, being no parties to the agreement, if any, between C. and his mother, and having done nothing on the faith of it.

Seemle, also, that the Statute of Limitations would be a bar, the trust, if any, declared by the deed, being an implied, and not an express, trust.

THIS was an appeal by the Trust and Loan Co. from an order made by Proudfoot, V.C., in a proceeding to quiet the title to certain property mortgaged to them in 1874 by the late John Hillyard Cameron, declaring that the premises were charged with a sum mentioned in an indenture dated the 14th day of July, 1848, and made between Mr. Cameron and Mrs. Elizabeth Cameron, and that such charge had priority over the claim and estate of the appellants, and that the terms of the trust upon which the charge existed, were in accordance with the trusts contained in the will of the late Angus Cameron.

The following is a memorial of the deed in question :

Between the Honourable John Hillyard Cameron, of the City of Toronto, in the Home District and Province of Canada, of the first part, and Elizabeth Cameron, of the same place, widow of

the late Angus Cameron, deceased, of the second part ; whereas, by the last will and testament of the late Angus Cameron, deceased, the said John Hillyard Cameron was appointed executor of the said will ; and all the property, real and personal, that the said Angus Cameron died possessed of, was devised to the said John Hillyard Cameron in trust for the said Elizabeth Cameron during her natural life, and from and after her decease, to Ann K. Cameron and Elizabeth Cameron, with limitations over to the said John Hillyard Cameron and Alan Cameron ; and whereas the said John Hillyard Cameron is indebted to the said trust fund, in the sum of £1,200 of lawful money of Canada, and is desirous of securing the same in accordance with the provisions of the said will ; witnesseth, that in consideration of the sum of £1,200 of lawful money of Canada, now paid by the said party of the second part, to the said party of the first part, the receipt whereof is hereby by the said party of the first part acknowledged, the said party of the first part doth grant *unto the said party of the second part for ever* all those certain parcels (setting out the lands comprised in the petitioners' mortgage).

The said party of the first part covenants with the said party of the second part, that he hath the right to convey the said lands to the said party of the second part, and that the said party of the second part shall have quiet possession of the said lands free from all incumbrances. And the said party of the first part covenants with the said party of the second part, that he will execute such further assurances of the said lands as may be requisite.

J. HILLYARD CAMERON. [L. S.]

The facts are sufficiently stated in the judgment.

The case was argued on the 20th November, 1878 (*a*).

Bethune, Q. C., (*Marsh* with him), for the appellants. The conveyance from J. H. Cameron to Elizabeth Cameron contains a grant of the lands in question to Elizabeth Cameron for ever, and not to her and her heirs, which words are required to make an estate of inheritance ; and on the death of Elizabeth Cameron the said J. H. Cameron became absolutely entitled to the lands in fee, as the reversioner thereof, free from any charge of the respondents which can affect the appellants, who are mortgagees of the lands in question for value, without notice or knowledge of the respondents' claims thereto: *Co. Lit.* 1 a. The respondents by their acquiescence in the dealings of

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the said J. H. Cameron with the property as his own, and by their laches have debarred themselves from asserting any claim to the property in priority to that of the appellants. Before the making of this conveyance, the lands belonged absolutely to J. H. Cameron, and were not affected by any charge or trust, and the conveyance was a mere security to the extent of a life estate given by an ordinary debtor to an ordinary creditor. It is only where the operative part is doubtfully expressed, that the recital of a deed affords a key to its construction: *Bailey v. Lloyd*, 5 Russ. 344. But the operative words of this conveyance show the nature of the estate intended to be conveyed, and the Court will not presume against the life estate so conveyed being an ample security for the debt which its recitals state that the conveyance was intended to secure. The conveyance recites that J. H. Cameron was indebted to the Trust Fund in £1,200, and was desirous of securing the same (*that is, the money*) according to the provisions of his father's will, but there is nothing to indicate an intention to convey the *lands* in question upon the particular trusts of the will. The true construction of the instrument is, that it is a mortgage to Elizabeth Cameron for life, to secure £1,200, *the proceeds of which mortgage security are to be held by her upon the trusts contained in the will*. To give the instrument this construction, would make its recitals and operative words read harmoniously together, but the construction given to it by the learned Vice-Chancellor causes the two parts of the instrument to clash, inasmuch as, while the operative part clearly conveys merely an estate for life, he holds that the recitals indicate an intention to charge the fee with the said indebtedness. As the interests of the respondents appeared on the face of conveyance, the appellants were not bound to make any further enquiries than as to the death of the tenant for life, and the appellants will not be prejudiced by any want of caution which does not amount to wilful blindness: *Jones v. Smith*, 1 Ha. 33. It has not been shewn, and does not appear upon the evidence

or otherwise, that the respondents in any way stand in the place of or represent Elizabeth Cameron, so as to enable them to maintain any claim against the lands. If there ever was any claim against, or lien upon, the lands in favour of the respondents, or either of them, since the death of the said Elizabeth Cameron, it has been long since barred by the Statute of Limitations. They cited *Shank v. Cates*, 11 U. C. R. 207; *Laing v. Mathews*, 14 Gr. 36; *Mulholland v. Merriam*, 19 Gr. 288, 20 Gr. 152; *Adams v. Ross*, 30 N. Y. 510, 511; *Hill v. Wilson*, L. R. 8 Ch. 888; *Leith* R. P. 155, 156; *Washburn* on Real Property, vol. 1, 3rd ed., 71; *Powell* on Mortgages, 19.

H. Murray and *A. Spragge* for the respondents. Under the deed in question Elizabeth Cameron took a life-estate in the lands, and on her death they reverted to J. H. Cameron charged with the trusts under the said will. This was clearly the grantor's intention. If the lands were now held by him, they would be bound by the trusts, and the appellants can stand in no better position, inasmuch as they had notice of them from the recitals. They were guilty of negligence in not making inquiries of the respondents, who were the beneficiaries under will, and who were named in the deed, instead of J. H. Cameron. The evidence shews that J. H. Cameron, prior to the conveyance to the appellants, recognized the respondents as having a charge upon the lands, and from time to time paid them the interest coming to them under the charge and trusts of the will. By reason of these payments, and of the express trusts, the bar of the Statute of Limitations does not apply. They referred to *White & Tudor's* L. C., Am. ed., vol. 2, 144, 161, 169, 170; *Wade* on Notice, 135, 136; *McDougall v. Bell*, 10 Gr. 283.

December 23rd, 1878 (a). Moss, C. J. A., delivered the judgment of the Court.

I gather from the statements of the counsel that the Trust and Loan Co. having contracted to sell the property,

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an objection was raised to the title on account of the existence of the deed of 1848, and proceedings having been taken to quiet the title, the respondents, Mrs. Clarke and Mrs. Muter, were made claimants in respect of any interest to which they might be entitled under that deed.

This instrument is very peculiar, when the circumstances are considered. At the time of its execution the grantor was a lawyer of great eminence and skill in his profession, so that it is difficult to imagine that he did not appreciate its precise legal effect. On the other hand, the supposition that he intended it to have that effect, and no greater effect, is by no means free from difficulty. It begins with the recitals that by the last will and testament of Angus Cameron, the grantor was appointed executor; and all the property, real and personal, of the testator was devised to him in trust for the widow during her life, and after her decease, in trust for the grantor's sisters, the respondents, with limitations over to Mr. Hillyard Cameron and Mr. Alan Cameron; and that the former was "indebted to the said trust fund in the sum of £1200," and was "desirous of securing the same in accordance with the provisions of the said will." It then proceeds in the usual formal manner, in consideration of the £1200, the receipt of which is acknowledged, to grant the property "unto the said party of the second part *for ever*."

As there are no words of inheritance, it is clear that no larger estate than one for the life of Mrs. Cameron passed by the conveyance. If authority were needed, the case of *Shank v. Cates*, 11 U. C. R. 207, is sufficient.

Indeed, the ancient sages of the law, as for example Littleton, refer to deeds containing the same words, as illustrating the rule that no language, however strongly indicative of perpetuity, can supply the want of words of inheritance.

Some attempt was made in argument to enlarge the effect of the conveyance by the aid of the covenants, but it is obvious, I think, that such a contention must fail. In the first place the covenants, being in the short form given by the Act, are restricted in their operation.

And further, I take it to be a well established rule of real property law that the quantity of the estate conveyed must depend upon the operative words, and not upon the covenants, the proper use of which is to defend the estate conveyed.

Then, as this instrument is executed, and not executory, it follows that the claimants must fail in their opposition, unless they can establish an equity to its reformation. The doctrine enunciated in *Laing v. Matthews*, 14 Gr. 36, of the correctness of which I think there can be no doubt, shews that they must make a case of the same strength as if they had filed a bill for that purpose, or that otherwise the petitioners are entitled to a certificate.

Although the learned counsel for the claimants had not succeeded in finding any case resembling this in its circumstances, and I have not been more fortunate in my research, (at least as respects English and Canadian authorities, for there are decisions in the United States touching the general question), no doubt can be entertained that equity has ample jurisdiction to supply words of inheritance in a conveyance. The real question for adjudication is, whether the claimants have established such a case as to bring themselves within the familiar rules by which the Court is governed, in affording this remedy.

The evidence consists of the deposition of Mrs. Clarke, one of the claimants, and the indications of intention that may be collected from the deed itself. The oral testimony does not in the least advance the claim. It is that of one of the litigants, and therefore, on the principle so forcibly enunciated in *Hill v. Wilson*, L. R. 8 Ch. 888, and in the specific provision of our statute, could not, even if clear and pointed, be made the foundation of a decree after the death of Mr. Cameron. But when examined, that evidence wholly fails to satisfy the conditions upon which the Court will assume to rectify a deed. Of these conditions an essential one is to shew beyond reasonable doubt what was the real agreement, which the written agreement, through mistake or otherwise, failed to express.

Upon this cardinal point Mrs. Clarke is able to give no information to the Court. She was not privy to, or cognizant of, any negotiations that may have led up to the deed. She was not consulted by her brother with reference to its terms, and she had no knowledge of any trusts affecting this property. She did not even know from her brother that he was indebted to her father's estate, although she learned this from other members of the family. At most she seems to have had some vague and indefinite notion that she and her sister were interested in the property. This seems to have been founded upon what she assumes is a fact, that after her mother's death the rents were paid to her and her sister. But it is impossible to conclude from the evidence that the rents as such were ever paid to her or her sister. The most that can be gathered is, that certain payments were made to her at intervals as a beneficiary under her father's will.

There are other difficulties in the way of accepting her statement as adequate foundation for a reformation of the deed, but in view of the want of confirmation it is unnecessary, and would be unprofitable, to pursue the subject any further.

Then our enquiry is limited to the terms of the deed itself. Although the grantor was himself learned in the law, as I have already mentioned, I do not desire to attach undue importance to that circumstance.

The records of forensic struggles over disputed wills prove that the greatest of lawyers have occasionally failed in precision, when dealing with their own property. Still it is not to be wholly disregarded. The petitioners say with much reason, suppose that the grantor were alive, and declared upon oath, as he did in effect on his word, that the intention of the deed was to convey a life estate, what would there have been to contradict his assertion? It is only just to believe that he would have made the same statement in Court as he made to the solicitor of the petitioners, and if he had done so, there is nothing on the face of the deed—any more than in the evidence of Mrs. Clarke—

to discredit its correctness. The recitals do acknowledge his debt to the estate, and express his desire to secure it in accordance with the provisions of the will, but there is not a single word from which there can be gathered an intention to secure it upon this property, further than it is actually secured by the very terms of the deed. There is no expression of an agreement or intention to charge the fee. There is nothing inconsistent with the view that he intended to do just what the deed did, namely, convey to his mother an estate for her life.

Very different considerations might present themselves if this instrument were executory. It cannot be doubted that if Mr. Cameron, in consideration of his debt to the estate, *agreed* to convey the premises for ever, as security, specific performance, might have been enforced at the instance of an interested person to whom, immediately or mediately, the promise was made. But this is a very different case. We have before us a formal deed having a recognized legal effect. It cannot be reformed, except on the ground of mistake, or possibly of fraud. There is no suggestion of the latter; there is no proof, either extrinsic or intrinsic, of the former.

But there is another familiar principle, which appears to be fatal to the claimants' position. The appellants have precisely the same rights as Mr. Cameron would have if he were resisting reformation. He could have successfully encountered that attempt by simply pointing out that the claimants were volunteers. They were no parties to any agreement that he may have made with his mother. They neither did or omitted anything, nor gave or relinquished anything, on the faith of his giving security upon this property. It is unnecessary to quote authorities to prove that persons in that position must be content with what the grantor may have conceded, and cannot ask the Court to enlarge his concession.

If these difficulties could be removed, the Statute of Limitations would appear to be a formidable obstacle in the way of the claimants. If the deed can be deemed to

declare a trust, (which, as it purports to be an absolute conveyance *quantum valeat*, seems an untenable assumption), it is certainly not express, but implied.

Then there is not the slightest evidence, (apart from the objection founded upon the uncorroborated testimony of a party to the litigation), that there was any thing done by Mr. Cameron to deprive him of the benefit of the statute, for Mrs. Clarke proves no more than that he paid her money at intervals as a beneficiary under her father's will, and by no means shews that the rents were received by her and her sister.

I think that the appeal should be allowed, and that the petitioners are entitled to a declaration, that the claimants have no charge upon the premises ; but as this litigation was for the purpose of establishing the appellants' title, and as the respondents were brought into it, not of their own motion, and as the question was one in which they might fairly submit their rights, they should not be charged with any costs either in this Court or in the Court of Chancery.

Appeal allowed.

KIELY V. KIELY ET AL.

Corporation—Election of directors—Demurrer—Pleading—Statutes.

The Act of Incorporation of the Toronto Street Railway Company provided that there should not be less than three directors, each of whom should be a shareholder. The Corporation consisted of three shareholders, who were the directors. Upon the death of one of them a meeting was called to appoint a new director, when one S., to whom the deceased director had bequeathed his shares, was declared elected by one of the two directors, although the other refused to concur in the appointment.

Held, upon demurrer to the bill filed to declare the election invalid and for other relief, reversing the decree of PROUDFOOT, V.C., 25 Gr. 465, that no election was necessary to make S. a director, there being only three shareholders, each of whom was qualified to be a director.

Held, also, that the demurring defendants were not restricted to the statements in the bill of the Acts under which the company was incorporated, but that they could refer to the statutes as printed in the statute book.

THIS was an appeal from an order overruling a demurrer of the Toronto Street Railway Company to the plaintiff's bill, reported 25 Gr. 463. The facts are stated there, and in the judgment on this appeal.

The case was argued on the 25th November, 1878 (a).

Attorney-General Mowat (with him *C. W. R. Biggar*), for the appellant *W. T. Kiely*.

Bethune, Q.C. (*Meek* with him), for the appellant *Mrs. Smyth*.

Blake, Q.C. (*Walter Cassels* with him), for the respondent.

The arguments sufficiently appear in the judgment.

The following cases were cited: *Bailey v. Birkenhead*, 12 Beav. 443; *Hump v. Robinson*, 3 DeG. J. & S. 107; *Davidson v. Grange*, 4 Gr. 382; *McMurray v. Northern R. W. Co.*, 22 Gr. 476; *Atwool v. Merryweather*, L. R. 5 Eq. 464, n.; *Russell v. Wakefield*, L. R. 20 Eq. 474; *MacDougall v. Gardiner*, L. R. 10 Ch. 606, 1 Chy. Div. 13; *Armstrong v. The Church Society*, 13 Gr. 552; *Cass v. Ottawa Agricultural Ins. Co.*, 22 Gr. 518-520; *Brice on Ultra Vires*, 2nd ed., 556-568; *Hallersley v. Earl of Shelburne*, 10 W. R. 881; *Nabob v. East India Co.*, 3 Bro. C.

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C. 292; *Daniell's* on Ch. Pr., 5th ed., 569; *Angell & Ames* on Corporations, 10th ed., 110; *Kyd* on Corporations, 10.

December 6, 1878 (a). Moss, C.J.A.—The first question raised is one of pleading. The company were incorporated by an Act of the Parliament of the Province of Canada, 24 Vic. ch. 83, which has since confederation been amended by an Act of the Legislature of this Province.

In his bill the plaintiff made no reference to these Acts except by alleging that the defendants, the Toronto Street Railway Company, are a corporation duly incorporated under the Acts in force in this province, and that “under the provisions of the Acts in force relating to the said company, your complainant and the said William Thomas Kiely had the only power to appoint another director.”

During the argument counsel for the company desired to refer to the statutes incorporating the company, as printed in the statute book, but the learned Vice-Chancellor gave effect to the objection that the defendants were restricted to the statement of the enactments in the bill.

The authority upon which he proceeded was *Bailey v. Birkenhead*, 12 Beav. 443. That certainly seems to be a strong authority in favour of the rule of pleading invoked. The point arose upon the argument of a demurrer, and the statute incorporating the defendants was declared to be a public Act, and one that should be judicially taken notice of as such.

The Master of the Rolls remarked that it had been determined that you cannot go out of the record, and even if the Act were inaccurately stated in the bill, you must take it upon demurrer as it is stated.

The only reported case in Chancery which I have seen upon the point is *The Nabob of Arcot v. The East India Co.*, to be found in 3 Bro. C. C. 292, and under the name of *The Nabob of the Carnatic* against the same defendants, in 1 Ves. Jr. 371. It arose upon a plea which in effect was that the Court had no jurisdiction to entertain the bill,

(a) *Present*.—MOSS, C. J., BURTON, PATTERSON, and MORRISON, JJ.A.

because by certain charters which had been confirmed by an Act of Parliament, the company possessed certain powers, by virtue of which the acts complained of had been done. The plea was overruled mainly, although not entirely, on the ground that nothing was tendered upon which issue could be taken.

In the course of his judgment, as reported by Brown, the Lord Chancellor observed at p. 308: "They say by charter and Acts of Parliament they have certain powers. Can this be the manner of pleading in a Court of Justice? Must they not shew *quo modo*? Must they not state the powers given them by the charters?" It is worth while to pause to observe the application of these remarks to the plaintiff's bill. He has contented himself with adopting a method of pleading, which the Lord Chancellor seems to deem intolerable, for without setting forth the language of the Statutes he has simply alleged that under their provisions certain powers were conferred upon the directors alone. But as this objection was not made to the bill, I proceed to quote the language which is more directly applicable to the point in debate. It is: "But the *Attorney* says, that they are confirmed by the Act of Parliament. The Act, in its nature, is a private Act, and therefore would be pleaded: but I take it for granted, that there is a clause at the end that it shall be a public Act. Does it follow that I am to take notice of a power given by charter, and confirmed by Act of Parliament, as if it was a general law of the realm? I should be glad to hear any case that would bind me in that manner."

It seems to me that the whole gist of that decision is, that if a defendant in his plea relies upon a private Act of Parliament, he must set out its terms. It certainly does not necessarily lead to the conclusion that if a plaintiff in vague and general terms alleges that an Act of Parliament has given certain powers to certain persons only, that statement must be accepted upon demurrer.

At Common Law there is no doubt that the rule anciently was that the Courts would not judicially take notice of Private Acts, and consequently all portions material to the action or defence must be stated in pleading.

From *Bacon's Abridgment* we learn that a public statute may be pleaded without reciting it, because the Judges are, *ex officio*, bound to take notice of every public statute, but if a private statute be pleaded, it must be recited. So in *Platt v. Hill*, 1 Ld. Raymond 381, it is laid down that the Court must take a private Act to be as it is pleaded, unless the plaintiff denies it, as he might by pleading *nul tiel record*, or by alleging that it is further enacted, &c.

I doubt whether this rule, to its full extent, ever found footing in this Province. At least I observe that in the case of the *U. C. College v. Boulton*, 2 C. P. 327, the various sections of the Act of Incorporation were freely referred to in the judgment of the Court upon a demurrer, although they had not been set out in the declaration. This point, indeed, was not raised, and perhaps the Act might have been plausibly argued to be public in its nature; but however that may be, I am sure it is every day practice in the Courts of law for a plaintiff to refer in general terms to a statute precisely similar in character to that now in question, without its being supposed that the defendant is precluded from asking the Court upon demurrer to look at it as it appears on the statute book. In fact the old rule originated in a state of circumstances which does not exist in this Province.

Private Acts were not necessarily printed by the printers for the Crown, and had to be proved by an exemplification or by an examined copy. The Judge could not be expected to take notice of them *ex officio*, and as they must have been proved, so they must have been alleged. But after the passing of the 13 & 14 Vic. ch. 21, an examined copy was no longer necessary.

This was expressly decided in *Beaumont v. Mountain*, 10 Bing. 404, and it is difficult to conceive any solid reason upon which the Judge should be enabled to look at the printed statute on the trial, and disabled from looking at it upon demurrer. It is worth observing that *Bailey v. Birkenhead* was decided before the Act of 13 & 14 Vic. ch. 21.

The case of *Cudden v. Tite*, 1 Giff. 395, has no application, for the Court was simply dealing with the case of private documents *inter partes*. But even if the rule of the English Court of Chancery, prior to the Judicature Act, were as contended, we do not think that it should be followed in this Province. Here private Acts are printed and distributed with the public statutes, and one class is just as accessible to Judge or counsel as the other. The whole spirit of the Orders of Court relating to pleading is opposed to the propriety of encumbering the record with long citations from statutes, the exact text of which can easily be consulted as occasion may arise. The establishment of a different practice would, we think, be highly inconvenient and useless.

We are then to consider the following state of facts as alleged in the bill. The shares in the capital stock of the demurring defendants are 2000 in number, of which 999 are held by the plaintiff, an equal quantity by the defendant Kiely, and the remaining two by the defendant Mrs. Smyth. Her two shares had been held by one Maurice Kiely up to the time of his death, which occurred in March, 1876. Until then he and the plaintiff and the defendant Kiely had been the directors of the company, and no other director had since been appointed until March last, when a meeting was called for the purpose of supplying the vacancy. At this meeting the defendant Kiely named Mrs. Smyth as a director, but the plaintiff objected to this proposal. Nevertheless the defendant declared her elected as a director, and she subsequently acted in that capacity. The object of the suit, as collected from the prayer of the bill, is to obtain a declaration of the invalidity of the election, and an injunction against the defendants Kiely and Smyth acting as directors, or pledging the credit of the company, or dealing with its assets, and the appointment of a receiver.

The only charge levelled against the conduct of the defendants is, that they passed a resolution authorizing the defendant Kiely "to buy the material and to proceed

with the building of the north-west route and the Sherbourne street extension of the said railway, and to purchase cars and other equipments." It is not alleged in the pleading, nor is it contended in argument, that these undertakings are *ultra vires* of the company. When to this are added the allegations that Mrs. Smyth is under the control of the defendant Kiely, and that he controls the company, and has the custody and possession of the corporate seal, and that any application to use the name of the company for the purposes of the suit would be futile, and the delay thereby involved would be prejudicial to the plaintiff, we have every material averment contained in the bill.

Turning to the Act of Incorporation, we find it provided that the affairs of the company shall be under the control of, and shall be managed by, a board of directors of not less than three nor more than seven, each of whom shall be a stockholder to an amount of not less than \$100, and shall be elected on the 1st day of October of each year, and that the directors shall continue in office one year and until others shall be chosen to fill their places; and if any vacancy shall at any time happen, the remaining directors shall supply such vacancy for the remainder of the year.

It is further provided, if the election of directors be not made on the day appointed by the Act, the company shall not for that reason be dissolved, but the stockholders may hold the election on any other day in the manner provided for by any by-law passed for that purpose.

Now, upon reading these clauses it seems to me that the bill is framed upon a mistaken notion of the powers of the directors with regard to filling up a vacancy. I think that these powers were only exerciseable in the interval between the vacancy arising and the 1st of October following. After that it was intended that any election of directors, if an election were necessary, should be by the stockholders. But it is wholly unnecessary to discuss that question, because in my opinion no election was necessary. There were only three shareholders, and each of them was qualified to be a director. If there was to be a board of directors at all

it must consist of three persons, and the plaintiff, the defendant Kiely, and Mrs. Smyth, were the only three persons eligible.

I do not think that under such circumstances a Court of equity, which regards the substance rather than the form, should require the empty and unnecessary formality of an election, the result of which was a foregone conclusion. Stripped of all figments, the simple fact is, that every time these three persons met there was a general meeting of all the shareholders of the company. The majority have decided upon a certain course of action which is *intra vires* of the company, and may be highly beneficial. It is not alleged that they have excluded the unit, or failed to give him an opportunity of expressing his views, or interfered with his rights as an individual shareholder.

Upon such a state of facts I venture to think that no Court would be warranted in fettering the hands of the majority, or in restraining them from managing the affairs of the company, or in placing it in the hands of a receiver. If the formality of attaching the name of director to Mrs. Smyth was essential, and if it required an election for the purpose, nothing more was necessary than to summon a meeting of the shareholders upon reasonable notice.

As I have already indicated, I do not think that such a proceeding ought to be deemed necessary, but even if it were, the doctrines of the Court, as I understand them, would not aid the plaintiff. It is manifest from the very nature of the case that the plaintiff could have procured such a meeting immediately upon request. Probably the time spent in giving his solicitors instructions for the suit would have been ample for the purpose. Indeed, it is no fanciful suggestion that at the meeting between the plaintiff and the defendant Kiely, when the latter insisted upon giving her the title of director, all the shareholders were present, for according to the allegations in the bill, his voice was that of Mrs. Smyth.

Entertaining these views so strongly as I do, it does not appear to be necessary to discuss the cases bearing upon

the refusal of the Court to interfere in matters of internal management or domestic concern.

With the greatest respect for the opinion of the learned Vice-Chancellor, I venture to think that the cases upon which he seems chiefly to rely, are inapplicable.

The object of the bill, in *Atwool v. Merryweather*, L. R. 5 Eq. 464 n., was to rescind a fraudulent contract, which it was attempted to support by a majority of votes, but of these a large proportion were held by the persons concerned in and benefiting by the fraud. In *Clinch v. Financial Corporation*, L. R. 5 Eq. 464, the transaction was *ultra vires*; and in *Russell v. Wakefield Waterworks*, L. R. 20 Eq. 474, the Master of the Rolls allowed a demurrer, one ground being that it was not alleged with sufficient distinctness that the impeached payment was beyond the powers of the company.

I think, therefore, that the demurrer should have been allowed, and as it was obvious that no amendment could remove the difficulty, the bill should have been dismissed, with costs.

There is also an appeal against an order for an injunction obtained by the plaintiff. Several special grounds were urged for consideration, if we were of the opinion that the bill was not demurrable, but it was conceded that if we thought it could not be sustained, it was unnecessary to go further. We are, however, of opinion that even if the bill was not open to demurrer, the objections to the order being made were well founded. That motion must therefore be dismissed, with costs. The plaintiff must pay the costs of both appeals.

BURTON, PATTERSON, and MORRISON, J.J.A., concurred.

Appeal allowed.

aff. 6 SCR 179.

ERB ET AL. V. GREAT WESTERN RAILWAY COMPANY.

*R. W. Co.—Shipping receipts—Fraudulent receipts issued by agent—
Liability of company.*

The agent of defendants at Chatham, a station on their line, having authority to grant bills of lading and shipping receipts for goods to be forwarded by the railway from that station, issued such documents representing certain flour to have been shipped by or received from B. & Co., and to be delivered to the plaintiffs at St. John, N. B. B. & Co. were a firm of millers at Chatham, of which the defendants' agent was a partner, and these bills of lading and receipts were fraudulently issued by him, no flour having been received. Bills of exchange drawn by B. & Co. on the plaintiffs, and annexed to these bills of lading and receipts, were discounted by a bank at Chatham, and forwarded to the plaintiffs, by whom they were accepted and retired.

Held, by MOSS, C.J.A., and BURTON, J.A., that the defendants were not liable to the plaintiffs, as the agent in giving receipts for goods never received, was not acting within the scope of his authority and employment, and for their benefit.

Held, by PATTERSON, J.A., and BLAKE, V.C., that the plaintiffs were liable, as under the circumstances, they must be presumed to know the purpose for which such documents were intended to be used, and were estopped as against the plaintiffs, who had acted on them, from denying the representations contained therein.

Per MOSS, C.J.A., and BURTON, J.A., a principal is only liable for the tort of an agent, where the misrepresentation is made, or other wrongful act is committed by the agent in the usual course of his employment, or within the scope of his agency, and for the benefit of his principal, or where the principal has authorized, sanctioned, or ratified it.

Per BURTON, J.A., bills of lading are not intended as a representation to the public that they may safely advance their money upon them, but are mere contracts between the carrier and the shipper.

Per PATTERSON, J.A., bills of lading are not only intended as an assurance to the shipper, but as a representation to the "banker or private person" with whom the statute deals, that they may act on the faith of it, and advance their money.

This was an appeal from a judgment of the Court of Queen's Bench, making absolute a rule *nisi* to set aside the verdict for the plaintiffs and enter a nonsuit, reported 42 U. C. R. 90. The facts are stated there, and in the judgments on this appeal.

An appeal was also entered from the judgment of the Court of Common Pleas, in *Oliver v. Great Western R. W. Co.*, 28 C. P. 143, which it was agreed should abide the result of this case.

The case was argued on the 16th May, 1878 (a).

Bethune, Q. C., (*C. Durand* with him,) for the appellants. The bills of lading in question were signed by Carruthers, who had authority to act as the defendants' agent at Chatham in signing these documents; and the plaintiffs having accepted the drafts upon the belief that the flour had been received by the defendants to be delivered to them upon the terms mentioned in the bill of lading, the defendants are estopped from denying the truth of the statements contained therein. It is contended that 33 Vic. ch. 19, O., does not apply, because the bills of lading do not state that the goods were received to be shipped on board the train. The two first bills are, however, technically within the statute, as they state that they were shipped on a train; and although the others only say that they were received to be shipped, still that amounts to a representation that they were to be shipped by the Great Western Railway. *Grant v. Norway*, 10 C. B. 635, was the earliest case in which the liability of a master of a vessel on a bill of lading for goods which had never been shipped came up; but the same law cannot be applied here as in the case of a master of a ship. The commercial business of the country is carried on through these bills of lading, and it was clearly intended to confer more powers on the agent of a railway company in granting these documents than on a master of a vessel. Moreover, the authority of the master in *Grant v. Norway* was simply to receive the goods on the vessel, while the agent here had power not only to receive the goods, but also to put them on the train by which they should go. This case is distinguishable from *Swire v. Francis*, L. R. 3 App. 105, as in that case the company got no benefit, while here they would have got freight. *Swift v. Winterbottom*, L. R. 8 Q. B. 244, which was a case very similar to this, was decided in favour of our contention. It was afterwards reversed, but on another point. It is reported in appeal as *Swift v. Jewsbury*, L. R. 9 Q. B. 301. They referred to *Barwick v.*

(a) *Present*.—MOSS, C.J.A., BURTON, PATTERSON, JJ.A., and BLAKE, V.C.

The English Joint Stock Bank, L. R. 2 Ex. 259; *Mackay v. Commercial Bank of New Brunswick*, L. R. 5 P. C. 394; *Weir v. Barnett*, L. R. 3 Ex. Div. 32; *Armour v. Michigan*, 22 Am. 603; *Freeman v. Buckingham*, 18 How. 182; *McLean v. Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 470; *Brice on Ultra Vires*, 2nd ed., 462; *Redfield on Railways*, 116-167.

M. C. Cameron, Q.C., and *Robinson*, Q.C., for the respondents. The case of *Grant v. Norway*, 10 C. B. 665, and *Jessel v. Bath*, L. R. 2 Ex. 267, shew that the respondents are not bound by these receipts, inasmuch as Carruthers was not acting within the scope of his agency, or for the benefit of the company. Under such circumstances they are not estopped from denying the receipt of the goods mentioned in the alleged bill of lading. The term "benefit," in this sense, means benefit to be derived in the transaction actually carried out, and the respondents cannot be held responsible because they would have received a benefit in the way of freight if it had been actually carried out. The statute 33 Vic. ch. 19, O, cannot assist the appellants, as it only applies to bills of lading; but the documents in question were not bills of lading. The name of the vehicle is not mentioned in them: *Abbott*, 11th ed., 279; they merely state that the goods have been received to be sent; nor had any person control over the goods in the sense understood by the statute.

January 4th, 1879 (a). PATTERSON, J. A.—The firm of Thomas Brown & Co., of Chatham, millers, is shewn to have consisted of Thomas Brown, a young man who was taken into the firm because he was a practical miller, and who seems not to have meddled in any way with the transactions now in question, and Carruthers, who was also agent of the Great Western R. W. Co. at the Chatham station, and was expressly authorized to grant bills of

(a) *Present*.—MOSS, C. J. A., BURTON and PATTERSON, J. J. A., and BLAKE, V. C.

lading for direct shipments from Chatham to the Maritime Provinces.

The plaintiffs are commission merchants at St. John, N. B., who occasionally received consignments of flour from Thomas Brown & Co., for sale on commission.

The course of business which seems to have been adopted in every instance was for Brown & Co., upon receiving a bill of lading or shipping receipt, to draw on the plaintiffs for an advance on the consignment; negotiating the draft, with the voucher attached, through a bank at Chatham, by whom it was in due course presented to the plaintiffs for acceptance, and accepted by the plaintiffs on the faith of the accompanying voucher.

This is the mode in which a very large proportion of the business of the country is transacted, as is well known to business men.

It is the subject of legislative recognition, the Statute of Canada on the subject, 31 Vic. ch. 11, giving legal effect to the endorsement of documents of the class, including any bill of lading or any receipt given by a carrier for cereal grains, goods, wares, or merchandize, delivered to any carrier for carriage from any place whatever to any part of this Dominion; following the earlier legislation of the Province of Canada, which may now be found in Rev. Stat. of Ont., ch. 116, secs. 13, &c.

Section 5 of the same chapter of the Revised Statutes contains the provisions of the Ontario Statute, 33 Vic. ch. 19, which followed the Imperial Act, 18 & 19 Vic. ch. 111, but applied to bills of lading representing goods to have been shipped on board a vessel *or train*, while the Imperial Act mentioned only a vessel.

Carruthers, in the name of Brown & Co., drew upon the plaintiffs in August, 1876, six drafts, three for \$825 each, and three for \$900 each, attaching to each of them a bill of lading or shipping receipt, signed by himself as agent for the defendants. Two were in the form of bills of lading, each of which represented that 200 barrels of flour had been shipped by T. Brown & Co., consigned to the plain-

tiffs at St. John. Each of the other four acknowledged the receipt of 200 barrels of flour from T. Brown & Co., to be sent by the Great Western R. W. Co. to the plaintiffs at St. John.

On the faith of these documents the plaintiffs accepted the drafts when presented by the bank, and have had to pay them.

None of the flour mentioned in the vouchers was received or shipped as represented; and the plaintiffs seek to recover from the defendants compensation for their loss.

The plaintiffs did not know Carruthers personally. They did not know that he was one of the firm of T. Brown & Co., and had no knowledge of the members of that firm beyond what was conveyed by a letter received by them in January, 1875, signed Thomas Brown & Co., which mentioned the death of Mr. Bogart "late of our firm," and that Mr. Thomas Brown having purchased from Mr. Bogart, the business would be continued by him and Mr. Bogart's late partner under the style and firm of Thomas Brown & Co. The firm had been A. D. Bogart & Co.

Not only was it known to the defendants, in common with the mercantile world, that bills of lading and shipping receipts were, as a matter of mercantile practice, frequently pledged for advances made on the security of the consignment, and that therefore these documents would, in all probability, be so dealt with; but it was known to them through their agent, Carruthers, that the very object of making these documents was to enable Brown & Co. to negotiate their drafts on the plaintiffs.

The intention was to place in the hands of Brown & Co. what purported to be valuable securities, being vouchers or representations to the plaintiffs that the grain was in the hands of the defendants, and in transit to St. John's, in order that the plaintiffs might act upon those representations by accepting the drafts and advancing their money. The plaintiffs did so act, and have been prejudiced by so doing. Therefore the defendants are estopped from denying the truth of the representations, if made by their

authority, or under circumstances which make them responsible for them.

I agree with the learned Chief Justice of the Common Pleas in *Oliver v. Great Western R. W. Co.*, 28 C. P. 143, and with the learned Chief Justice of the Queen's Bench in the present case, that the issuing of these documents must be taken to have been the act of the defendants.

Carruthers is called the agent, but that word scarcely expresses his position. He was the manager of the business at the Chatham station. The defendant corporation can act only by the hand of some natural person, and Carruthers was the person by whom they acted. Part of the business of the station was to grant bills of lading and shipping receipts, which are instruments to be dealt with in the way authorized and made effectual by statute, as securities or representatives of value on which money may be obtained. It never was the intention of the Legislature that a banker or private person should be obliged to enquire into the truth of the facts stated in the warehouse receipt, bill of lading or other vouchers with which it deals. And as pointed out by Mr. Justice Wilson in the Court below, there would be little use in making an inquiry when some one's word would have to be relied on at last.

Practically, the only course is to act on the faith of the vouchers; and the business of the manager is to give such vouchers.

Many cases have been referred to, both in argument before us, and in the judgments delivered in the Court below, and those delivered in the Common Pleas in the case of *Oliver v. Great Western R. W. Co.*, 28 C. P. 143.

I think the principles enunciated in those cases fully warrant the plaintiffs' recovery in this action, although I confess I have found much difficulty in distinguishing this case from *Grant v. Norway*, 10 C. B. 665.

That is, in my judgment, the only decision which creates much question, as the cases of *Hubbersty v. Ward*, 8 Ex. 330, and *Coleman v. Riches*, 16 C. B. 104, which are relied on along with it by Mr. Justice Gwynne in his very lucid

and able judgment in *Oliver's Case*, do not seem to me to add to the weight of the earlier decision.

In *Grant v. Norway* a bill of lading had been signed by the master of a vessel for goods which had not been shipped, and the owner was held not to be bound by the master's representation, even in favour of an endorsee of the bill of lading who had advanced money on the faith of it, because the master's authority as agent of the owner was only to give a bill of lading for goods actually shipped.

Hubbersty v. Ward, 8 Ex. 330, was a very different case. There goods had been shipped in the name of the plaintiff, who had made advances on them to the original shipper, and bills of lading were given to the plaintiff. When the plaintiff demanded his goods on the arrival of the ship, he found that they had been delivered to other persons, and he therefore brought the action against the owner. The defence was founded on the fact that after the plaintiff had received his bills of lading, the captain had given another bill of lading for the same goods to the person to whose endorsee they had ultimately been delivered, having been induced to do so by the fraud of the original shipper. The case is often cited, both by counsel and Judges, as being decided on the principle of *Grant v. Norway*, but the plaintiff's right to recover seems to me to have depended on simpler considerations than those which governed the decision in *Grant v. Norway*.

Coleman v. Riches, 16 C. B. 104, was decided, as I understand it, on the distinct ground that elements were wanting which exist in the case before us.

That action was for the fraudulent representation that the defendant had received at Bristol for the plaintiff, from one Lewis, certain wheat which the defendant knew the plaintiff had bought from Lewis for £124.15, payable on the receipt by the defendant at Bristol of the wheat from Lewis, by which the plaintiff was induced to pay Lewis the £124.15.

The course of dealing proved was that when the plaintiff purchased corn he directed the seller to deliver it at the

defendant's wharf at Bristol to be there shipped; and upon production by the seller of a receipt, signed by the defendant or his agent, vouching for the delivery of the corn at the wharf, the plaintiff paid him the amount. And it was shewn that the defendant knew of this. The fraudulent receipt in question had been given by one Board, who was the defendant's agent, for grain which had not been delivered.

During the argument Jervis, C.J., remarked, at p. 106: "I certainly do not see how Riches' *knowledge* that Coleman was in the habit of paying the vendors on the production of his receipt acknowledging the delivery of the wheat, makes his giving such a receipt a representation to Coleman." And in giving judgment he said, at p. 117: "It is not pretended that there was any contract as between Coleman and Riches, that, in consideration that the former would cause his purchases to be delivered at the wharf of the latter, the latter should on receipt of the goods give such vouchers as the former might act upon. If there had been any such contract, a very different question might have been raised; for in that case it might possibly have been said that the wharfinger had undertaken to employ competent persons faithfully to perform that duty. * * We must look here at the surrounding circumstances; and when we find no *actual* authority in the agent to do the act complained of, we must see whether the facts warrant the inference that in doing it he was acting within the scope of the authority conferred upon him by his general employment. When Board gave a receipt for wheat which had never been delivered at the wharf, he was not acting within the scope of his authority; he was not acting for his master, but contrary to his duty and against his master's interest."

Cresswell, J., said, at p. 119: "It may be true that Coleman was in the habit of paying for the corn he purchased, upon the production of a receipt vouching for its delivery at the wharf, and that Riches knew it. But the defendant had nothing to do with the plaintiff's manner of conducting his business. It leaves the case just as it was before. Was there then any actual authority in Board to bind the

defendant by his representations? Certainly not. Then was the situation of Board such as to bring the act in question within the scope of his authority? I think it was not. He was not employed to represent that to be true which he knew to be false. With respect to the case put of a warranty by a servant in the sale of a horse, I find Ashurst, J., says, in *Fenn v. Harrison*, 3 T. R. 760, 'I take the distinction to be, that if a person keeping livery stables, and having a horse to sell, directed his servant not to warrant him, and the servant nevertheless did warrant him, still the master would be liable on the warranty, because the servant was acting within the general scope of his authority, and the public cannot be supposed to be cognizant of any private conversation between the master and servant; but if the owner of the horse were to send a stranger to a fair with express directions not to warrant the horse, and the latter acted contrary to the order, the purchaser could only have recourse to the person who actually sold the horse, and the owner would not be liable on the warranty, because the servant was not acting within the scope of his employment.' * * Here there was no actual general authority, nor anything to justify us in inferring that any existed. The case, therefore, falls precisely within *Grant v. Norway*."

Williams, J., said, at p. 121: "If there had been evidence of an agreement between the plaintiff and defendant that the latter should furnish the vendors with receipts on the delivery of the corn, upon the faith of which receipts the former should pay the price, I must confess I should have felt great difficulty in saying that the defendant would not be liable for the fraud of an agent entrusted by him with the business of the wharf, by means of which the plaintiff had been induced to part with his money on the faith of such delivery having actually taken place."

Crowder, J., discusses the matter in the same way.

Three of these judges, viz.: Jervis, C. J., Cresswell, J., and Williams, J., were those who decided *Grant v. Norway*, 10 C. B. 666, which Crowder, J., had argued as counsel for the

plaintiffs, the endorsees of the bill of lading. The intimation which they give of what would have distinguished the two cases, is therefore of peculiar value.

Other considerations would have arisen, they tell us, if there had been a contract between Coleman and Riches, that Riches should give receipts for grain delivered at his wharf, upon which Coleman might act; and it might in that case have been said that the wharfinger had undertaken to employ competent persons faithfully to perform that duty. The receipt actually given is treated as given to Lewis as a voucher, not to Coleman; and the circumstance that Coleman habitually acted on the faith of these receipts is treated as an accident which did not affect Riches, or create such a privity between him and Coleman, as to enable the latter to insist that the receipt was a representation made to him with intent that he should act upon it. If the course of business had been to give vouchers for the purpose of their being acted upon by Coleman, I take the opinion of the judges to have been that the giving of such vouchers would have come within the scope of the employment of the man in charge at the wharf, so as to justify Coleman in relying upon them as having been given by Riches. I do not attempt to show how this is consistent with the decision in *Grant v. Norway*. I notice merely that the Judges who decided *Grant v. Norway* seem to me to say that it is consistent with it.

The citation given by Cresswell, J., from the language of Ashurst, J., in *Fenn v. Harrison*, 7 T. R. 760, is apposite to the same purpose, shewing that 'a servant, acting in the character in which he is allowed to appear to the world, can bind his master without actual authority and contrary to express prohibition.

We must take it to be the fact that a warehouseman or carrier giving a receipt or bill of lading such as our statute makes negotiable as representing the goods, and in view of the mode of moving produce by means of advances obtained on those securities, gives it not only with the knowledge that it may be acted upon, but with the intent that it shall

be acted upon. Intent does not imply desire or wish that it shall be used in the particular way. It points merely to the purpose of giving the document, the purpose of enabling the holder to use it in the particular way. I referred to cases on this point in *Walker v. Hyman*, 1 App. R. 360, *et seq.*

These documents are given not only as vouchers to the shipper for the delivery of his produce, but as securities on which he may obtain money. They are intended not only as an assurance to him, or a means of proving that he delivered so much produce, but as a representation to the "banker or private person," with whom the statute deals, that matters are as there stated, and as a representation made with intent that they shall act on the faith of it, and advance their money.

This is just the element which I understand the Judges to have said was absent in *Coleman v. Riches*, 16 C. B. 104, and the absence of which left that case within the rule in *Grant v. Norway*, 10 C. B. 665.

It is a course of dealing having general features not unlike that in *Coleman v. Riches*, 16 C. B. 104, but differing in one essential feature. In *Coleman v. Riches* the defendant stood outside of the arrangement which existed between Coleman and Lewis. He knew of it, but it was not his concern. In the case before us the defendants not only know of the use made of their bills of lading and shipping receipts, but they give them in order that that use may be made of them. The course of dealing is theirs as well as that of the shipper and his consignee.

This being so, I think we should set aside the rights as well as the interests of the mercantile community if we did not say, what Jervis, C. J., suggested might possibly in similar cases be said, that the defendants had undertaken to employ competent persons faithfully to perform the duty.

I think the scope of the employment of Carruthers clearly embraced the conduct now in question. Bearing in mind the twofold purpose of the vouchers, a receipt to the shipper and a representation to the consignee or the banker,

the scope of the employment, while it would not enable him to make his employer liable to the shipper for produce never shipped, yet entitled third parties to rely upon the representations as true.

A reference to the defendants' circular, 471, which is in evidence, makes it more apparent that Carruthers must be held, as to innocent parties at all events, to have fully represented the defendants, and to have been in fact the hand by which they acted. That circular states that agents at certain stations, which include Chatham, are authorized to grant bills of lading to shippers direct. Agents at stations other than those are to issue ordinary shipping receipts, on the face of which the agent is to make the notation:—"This receipt will be exchanged for a through bill of lading on presentation and surrender of it to the agent at any one of the stations at which through bills of lading are given." And the most convenient points for obtaining bills of lading in the several districts are designated, one being "W. Carruthers, Chatham, between Bothwell and Windsor."

The analogy between an official of this character, expressly named and held forth as authorized to give bills of lading, not only for goods shipped by himself, but in exchange for shipping receipts from other stations given for goods which, as far as he knows, may never have been shipped, and the captain of a vessel who signs a document which evidences a contract with himself, and on which his personal liability is in some cases even greater than that of the owner whose agent he is, becomes less distinct the more one considers it. The express authority given to Carruthers is far wider than that of the master, who, as stated by Jervis, C. J., in *Coleman v. Riches*, 16 C. B. 104, has not a general authority, but only certain special authorities, amongst others, to sign bills of lading for goods which are actually shipped.

In *Howard v. Tucker*, 1 B. & Ad. 712, the master had signed a bill of lading in India which stated untruly that the freight had been paid. The owners were held to be estopped as against the endorsee of the bill of lading from

claiming freight after the arrival of the vessel in England, because it was in the course of the master's employment to receive freight.

It was argued by Mr. Bethune, though the point was not much pressed, that under the statute R. S. O. ch. 116, sec. 5, sub-sec. 3, the defendants should be held liable at all events upon the two bills of lading. The clause enacts that every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel or train, shall be conclusive "evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods, or some part thereof, may not have been so shipped, unless such holder of the bill of lading has actual notice that the goods had not in fact been laden on board, or unless such bill of lading has a stipulation to the contrary; but the master or other person so signing may exonerate himself in respect to such misrepresentation, by shewing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or of some person under whom the holder claims."

One answer made by Mr. Cameron was, that these documents were not bills of lading, because they do not name the cars which contained the grain—a bill of lading proper containing the name of the vessel on which the goods are laden.

I think these are bills of lading, not only because the defendants treat them as such, but because I do not consider the car the equivalent of the vessel. I think the railway must be taken to represent the vessel—including of course in the railway the cars and engines used in working it. It is the instrument by which the defendants convey freight—as the vessel is that of the carrier by water.

I think these two bills of lading represent that the flour had been shipped on board a train within the meaning of the clause, and I think it follows from the view I have taken of the position of Carruthers, that they are signed by the defendants. *Royal Canadian Bank v. Grand Trunk R. W. Co.*, 23 C. P. 226.

It has not been contended that the defendants are protected by the last part of the clause, and that could not well be argued; because although the misrepresentation was undoubtedly caused by the fraud of the shipper, and in fact wholly so caused, it was not without default on the part of the defendants, whose officer was a party to it. The circumstance that the shipper and the officer of the defendants were one and the same person, cannot alter the position, as far as the endorsees are concerned, from what it would be if they were two persons who colluded together.

In my opinion the appeal should be allowed.

BLAKE, V. C.—On the 23rd of June, 1876, the defendants issued "Circular No. 471," styled "Instructions to Agents, Bills of Lading for direct shipments to Europe and the Maritime Provinces." By this circular certain agents are informed that "The following regulations governing the issue by this company's agents of bills of lading for direct shipments to Europe and the Maritime Provinces, have been adopted and must be put into operation on receipt of this circular." It proceeds: "Agents at the undermentioned stations are authorized to grant bills of lading to shippers direct * * * Chatham."

The company, from time to time, make such regulations as they deem best for the facilitating the traffic on their road, and by such facilities they seek to retain for, or to divert to, their railway, such part of the carrying trade of the country as they can control.

The company, well aware of the fact that a large portion of the produce of the country is moved by the use of shipping notes or bills of lading on the faith of which advances are made, knew that the granting of such certificates at certain points on their line of railway must benefit their business, by affording those shipping and those making advances an easier means of completing their arrangements. The competition with rival lines of railway or other modes of carriage causes those engaged in the carrying trade to make such regulations as will make theirs the favoured

route, even although thereby they cast upon the company some additional liability. So here, seeing the utility of enabling a trader to produce the evidence of his shipment to the person making an advance, in place of requiring to send his agent to inform him of the fact that the goods are shipped, the railway company undertake to perform that service.

The benefit which the company hope to receive from this additional responsibility which they undertake, is an increase of business from the facility they thus afford to those dealing with them. To encourage through traffic, in place of applying at the head office, the company permit agents at certain selected stations to furnish bills of lading for such direct shipments to shippers. In place of retaining this class of its business at the central or other office, to promote its interest the company clothe many of their agents with power to grant these evidences of goods being shipped. They make the transaction of this duty a part of the work for which that agent is employed. They furnish him with the papers and documents from which all the world may know that in this department the company have empowered the agent at Chatham to deal for them. The only manner in which the company can carry on their business is through the intervention of their servants or agents; and where a portion of such work is assigned to a designated servant, and he is clothed with the means by the company of transacting it, the act of the servant thus empowered becomes the act of the company, and the company are liable for that which they have done in and by the agent, deputed, as to such class of work, to stand in the place of the company.

If the hand thus set in motion makes a mistake or commits a fraud in the work which it has been bidden to undertake, the body which was to benefit by the act, if properly done, must assume the responsibility if, in place of an advantage arising, a liability is incurred. In the present case the company, for their own purposes, allowed Carruthers to stand for them in the business of granting

bills of lading at Chatham. The papers furnished by the company to Carruthers informed shippers, bankers, and commission agents of this fact, and I think they had a right to conclude that whatever Carruthers could do, as such shipping agent, and did do, they were entitled to consider as done by the company. The plaintiffs were, I think, at liberty to conclude, when there was produced to them in the authorized form of the company, a bill of lading duly signed by the person the company had appointed for that purpose, shewing that a consignor had shipped 200 barrels of flour at Chatham, that the Great Western R. W. Co. thereby intended, and did represent, that the goods therein specified were, according to the terms of the bill of lading, shipped.

They were then, I think, justified in acting on this representation. According to the ordinary dealings of the company, this representation was made in order that it might be acted on. If there has been any detriment to the plaintiffs it must be borne by those who directly or indirectly made the representation which resulted in this injury.

It would be useless to go over the authorities which have been considered and discussed in the present case and *Oliver v. Great Western R. W.*, 28 C.P.143. I think that here the defendants gave their agent, Carruthers, a duty to perform, they clothed him with the requisite power to perform it, they placed him in a position which enabled him to transact it, and they are responsible for the mode in which he executes such duty. It is immaterial, to my mind, whether he through inadvertence gave a bill of lading for more goods than were shipped, or whether he innocently gave a bill of lading for goods not shipped, which he anticipated would be shipped, and which were never shipped, or whether, as here, he fraudulently gave a bill of lading for goods which never existed; the company must, in all such cases make good to the innocent holder for value the extent of the loss occasioned by the misrepresentation. The weight of authority seems to sustain this position. I

can find no case which overturns it. I think the verdict should be entered for the plaintiffs, and the appeal allowed with costs. If we hold otherwise, we shall virtually be saying that the bill of lading for the chief object it is given is valueless, and that one advancing money on a cargo must, notwithstanding his bill of lading, inform himself through some other agent or otherwise, whether the goods certified as shipped have in fact been shipped.

BURTON, J. A.—I agree in the result arrived at by the majority of the Court of Queen's Bench.

It does not appear to me to be possible to draw any distinction between the cases of these defendants and that of an ordinary firm or individual. The same principles must govern both cases.

To say that corporations must necessarily act by agents, and that the receipt or representation of the agent is therefore their receipt or representation as fully as if given under their corporate seal duly affixed, appears to me, with great deference to those who advance the argument, to be a fallacy. No doubt a corporation must act by agents. It has an executive body known as a board of directors, which has the power of transacting all the business of the company, and it is quite possible that having that general authority, if in the course of managing its affairs the directors made false and fraudulent representations whereby third persons were injured, the general body of shareholders, whose agents they are, might be responsible. I assume, at all events, for the purpose of this case, that if the board of directors had fraudulently issued such a receipt for the purpose of affecting the conduct of these plaintiffs, the company they represent would be liable.

But the question is whether the company can be made responsible for the frauds of an agent with a limited authority, like a station master, where they have not benefited by the fraud,—in other words, whether they can be sued as wrongdoers by imputing to them the misconduct of the official whom their directors have employed. I do not for

a moment doubt that where an agent of a corporation in the course of his employment does something of which the corporation knowingly takes advantage, and by which they profit, and it turns out that the act so done by the agent is a fraudulent act, they cannot afterwards repudiate the agency, and say that the act of which they have taken the benefit is not an act for which they are liable. But this is upon the principle that a ratification is equivalent to a previous authorization. If the principal, on discovering the fraud, refused to accept the benefit, and repudiated the transaction, it is difficult to see upon what rule he could be made liable.

If the representation made by the agent be within the scope of his authority, one can recognize a rational ground for making the company liable, even though they derive no benefit from the transaction; but how can the granting of a false receipt or bill of lading in fraud of his employers, an instrument he was authorized to grant only after the receipt of the grain or produce referred to in it, be held to be within the scope of his authority?

If the company had been aware that he was in the habit, for the convenience of shippers, of granting such documents before the articles they professed to represent had been actually received, and had recognized such a course of dealing on his part, an implied agency would thereby have been constituted to carry on the same dealings, and to do acts of the same character; and if the agent had abused the confidence thus reposed in him, and fraudulently granted receipts for his own benefit, well knowing that no goods were to be received to answer their requirements, I entertain a strong conviction that the company would properly be estopped from disputing the truth of those receipts, and shewing the actual facts, where the rights of *bonâ fide* dealers were concerned.

If, however, the actual authority to the agent was to receive the goods, and upon receipt to grant a receipt or acknowledgment for them, then the power was limited to acts of the same character, but not of a character wholly

different, though clothed in the same form. In order to bind the principal, the acts done must always be within the power.

The learned Chief Justice of the Queen's Bench says, 42 U. C.R. 105, that Carruthers was not simply an ordinary station agent, but a general agent authorized to do a particular class of business, viz., to grant bills of lading for produce, &c., "such bills," he adds, "as the defendants well knew, being transferable from hand to hand as representatives of value." Whether he occupied the higher or lower position, the fact still remains that his authority was confined to granting receipts or bills of lading only for such goods as were actually received. It nowhere appears that his authority extended beyond this, or that the company ever knew or recognised the granting of receipts where the goods were not received, and with great deference I dissent from the learned Chief Justice's further conclusion, that "for the purposes of this business," if by that is meant granting bills of lading whether the goods were received or not, "he was held out by the defendants to the public as a person in whose honesty in the discharge of duty the public might place confidence."

The aphorism attributed to Lord Chief Justice Holt, in *Hern v. Nichols*, 1 Salk 289, and so frequently referred to on the argument, "that where one of two innocent persons must suffer, he who has employed an agent and enabled him to commit a fraud, should be a loser rather than a stranger," has no application until the agency is established. The case itself is a briefly reported *Nisi Prius* decision, and was no doubt correctly decided upon the facts of that case, as the factor there was acting strictly within the scope of his employment in selling the silk, although he made a false representation which enhanced the price. The defendant obtained the benefit of that representation and retained it; and that decision is in accordance with all the English authorities, not on the ground of the trust and confidence in the agent, thereby enabling him to commit a fraud, but because the principal derived a benefit from it;

and where this ingredient does not exist no case can be found in the English reports where the principal has been held liable in tort for the unauthorized and fraudulent representation of his agent.

The case of *Barwick v. The English Joint Stock Bank*, L. R. 2 Ex. 259, so far from being in conflict with this view, appears to me to support it. That was a representation of fact made by the defendants' manager, whereby they obtained and appropriated to themselves a sum of money deposited with them to the credit of their debtor. They were taking advantage of the fraud, which was sufficient to warrant the recovery. But Bramwell, L. J., in a recent case questions the reasoning on which that judgment was founded, and puts it upon this ground, "that every person who authorizes another to act for him in the making of any contract, undertakes for the absence of fraud in that person *in the execution of the authority given.*"

We were referred on the argument to some cases, which I observe were cited also in *Oliver v. the same defendants* in the Common Pleas, 28 C. P. 143, cases in which the principal was held liable in tort for the misconduct of his agent in the course of his employment, though acting contrary to the express instructions of the principal.

In one of these, *Limpus v. The London General Omnibus Co.*, 1 H. & C. 526, a reason is suggested by one of the Judges for making the principal liable, which, if good law, would apply perhaps with equal force to the case of these defendants, viz., that there ought to be a remedy against some person capable of paying damages to those injured by improper driving. That would be an easy solution of the present difficulty, but the ground of that decision was, that what was done was in the prosecution of the master's business, and for his benefit, and that if it had been found that he did the act not to further his master's interest, or in the course of his employment, but from private spite, the defendants would not have been responsible.

So, as in the case often put, if the servant of a blacksmith in shoeing a horse should maliciously prick him, he

and not the master would be liable, though it would be otherwise if it were done unintentionally.

Mr. Justice Gwynne, in the judgment in *Oliver* against these defendants, to which I have referred, has cited and ably discussed the cases of *Grant v. Norway*, 10 C. B. 665, *Coleman v. Riches*, 16 C. B. 104, and *Hubbersty v. Ward*, 8 Ex. 330, in their bearing upon this case. I shall only refer to them for the purpose of signifying my full concurrence in his reasoning. Those cases have been fully recognized and acted upon in numerous cases instances in the Supreme Court of the United States.

The same reasoning applies to the question of estoppel referred to by the Chief Justice of the Queen's Bench.

The defendants here ought not to be estopped from showing the real facts in consequence of the plaintiffs having advanced money on the faith of the receipts, because the change in their condition was not brought about by any act of the company, or of any one acting within the scope of an authority which they had conferred. A wilful fraud committed by a station master in signing false receipts, would not be within his agency. It is a fraud of the individual who, for his own benefit, concocted vouchers which were never intended to benefit the company, of which they had no knowledge, and from which they derived no benefit. The consequences to a railway of adopting a different rule would be disastrous to them, and would place them at the mercy of every station agent along their line.

But it is said that the element that was wanting in the case of *Coleman v. Riches*, 16 C. B. 104, above referred to, is supplied in this case, and this is attempted to be reasoned out by arguing that it has become an usual thing for bankers to make advances upon documents of this nature, which have been expressly recognized by statutes, which give legal effect to their endorsement, and this is the mode in fact by which the produce of the country is moved, and is well known to the whole commercial public; and that the defendants at all events cannot plead ignorance, as it was known

to their agent who effected the fraudulent issue of the documents in order that the firm of which he was a member might negotiate them.

I dissent altogether from this latter proposition, which appears to me to be a begging of the whole question. Carruthers's agency was limited to a particular and special sphere. When acting out of that sphere he ceased to represent his principals. Any knowledge that he might acquire either as to the general or special use of such documents, it was no part of his duty to communicate, and I apprehend that the true test in such cases is—was the information of a character which it was the duty and business of the agent to communicate? If so, it binds his principal, otherwise not. But assuming that the defendants must be taken to be aware that these documents, thus recognised by the Legislature and made negotiable as representing the goods, are used by the holders as valuable securities for raising money, how is this case in principle carried beyond *Coleman v. Riches*, 16 C. B. 104?

In that case it was known to the defendant that it was the plaintiff's usual course of business to direct all corn purchased by him to be delivered for shipment at the defendant's wharf, and to pay the vendor the price on the production of the wharfinger's receipt for the goods. But it was not pretended there, nor is there any pretence here, that there was any contract as between the plaintiff and defendant that in consideration that the former would cause his purchases to be delivered at the wharf of the latter, the latter should, on receipt of the goods, give such vouchers as the former might act upon. If there had been any such contract, it might have been perhaps successfully urged that the wharfinger had undertaken to employ competent persons honestly to perform that duty.

Here the defendants may have had notice that these documents were frequently pledged in the way suggested, but there was no contract or engagement with the bank or these plaintiffs that they would give vouchers that they might act upon; it was a matter of indifference to them.

what use was made of the documents; and for the same reason the argument, I think, fails, which has been urged in support of the contention, that these bills of lading or receipts are intended not only as a means of proving that the shipper has delivered so much produce, but as a representation to the persons to whom they are endorsed that the statements in them are true, and may be safely acted upon.

They are not issued, I apprehend, with any such intent or purpose. They are given in each case as evidence of the quantity received for carriage and the contract to carry, though in the cases of the through bill of lading, that contract is to carry it over other railways than their own.

A very strong inference that no such interpretation can be placed upon these documents, is, I think, to be derived from the recent Act, 33 Vic. ch. 19, O. It is clear that before the Act the defendants would not have been liable to an endorsee for value for a deficiency in the quantity represented by the bill of lading to have been shipped, because the agent, though authorized to conduct their business, was not their agent to sign an admission contrary to the fact. The statute does not alter their liability in that respect, though it makes the bill of lading conclusive evidence against the party signing it. Would it not be a strange anomaly that an action of deceit could, nevertheless, be brought against them?

I cannot bring myself to believe that these documents are, as against the company, anything more than what they purport on their face to be: or that they are intended by them to be a representation to the public that they may safely advance their money upon them, or that they are more than mere contracts between themselves and their shippers. The holder of such documents is at liberty to make such use of them as he thinks proper, but he cannot thereby extend the liability of the company making the contract.

In such an action as the present it is incumbent on the plaintiff to shew that the document was given with the

purpose of affecting the conduct of the plaintiff, either expressly or as one of the commercial public whom the defendants' circulars were likely to reach, and that he did act upon it to his prejudice; but the circular carries the case no further than this, that facilities of this kind were open to people beyond the line of the defendants' road, and that by obtaining a through bill of lading they could avoid inconvenience, delays, and expense.

But there appears to me to be an insuperable difficulty in the way of the plaintiffs' recovery. The receipt, whatever may be its effect, was issued by the station master to the firm of which he was a member. That did no harm to any one; but Carruthers or his partner obtained money upon the strength of it from the Merchants' Bank, who negotiated the draft which the plaintiffs, upon the faith of the bank holding the annexed receipt or bill of lading, accepted and subsequently paid. In negotiating the bills of lading Carruthers was not acting within the scope of his employment, or as the agent of the defendants in any way; but apart from that I think the defendants cannot, either as the declaration stood originally or under any amendment that can be made to it, recover against these defendants.

In *Armour v. Michigan*, 22 Am. 603, the majority of the Court held the defendants liable upon a bill of lading given by their agent, who had been imposed upon by one Michaels by the production of a forged warehouse receipt. The result was that when the agent granted the bills of lading the company had no goods to represent it, nor a right to any goods in the warehouse.

The Court held that the company were estopped by the statements in the bill of lading from denying that it had the goods to comply with its terms. The defendants' agent they said was informed by Michaels that the bill was to be used at the bank on the same day. It was issued with the expectation that it would be acted upon by bankers. The representations in the bill were made to any one who in the course of business might think fit to make advances

on the faith of them. There is thus, it was said, present every element necessary to constitute an estoppel *in pais*, a representation made with a knowledge that it might be acted on, and subsequent action on the faith of it to such an extent that it would injure the plaintiff if the representation were not made good. With great deference I think one very essential element was wanting, namely, the authority of the agent to make the representation, unless it was shewn that by a course of dealing known to the company the agent was empowered to issue bills of lading upon the production to him of a warehouse receipt.

The case of *Baltimore and Ohio R. W. Co. v. Wilkens*, 22 Am. 26, is very similar in its facts to the present case. The Judge who delivered the judgment of the Court, after stating the facts, proceeds: "This being so, is there any legal principle which makes the company responsible to a consignee for advances on a bill of lading fraudulently issued by its agent, who was also his consignor, for goods never in fact received by it, and never placed in its cars? If any doctrine of commercial law can be regarded as well settled, it is that the master has no authority to sign a bill of lading for goods not actually on board the vessel, and therefore the owner of the ship is not responsible to parties taking or dealing with, or making advances on the faith of such instrument, which is untruthful in this particular. The consignee and every other party thus acting does so *with notice* of this limitation of the power of the master, and acts *at his own risk*, both as respects the fact of shipment and the quantity of cargo purported by a bill of lading to be shipped."

The learned Judge notices the statement of Buller, J., in *Lickbarrow v. Mason*, that bills of lading are negotiable, and that arguments have been frequently used based upon it, and supported to some extent by the dicta of able Judges, that a third person dealing with such instruments should be protected in his reliance on them, according to their exact tenor, against charterer and owner as well as master, and then refers to the later and well considered

judgment in *Grant v. Norway*, which, as he says, settled the law in England, and refers to the fact that it had been followed in many cases in which, in extension of the same principle, it was held that a bill of lading so signed is not *conclusive* against the owner as to the *quantity* of goods or cargo shipped; a construction, which has been recognized by Parliament in legislating upon the matter, when they enacted that every bill of lading in the hands of a consignee or endorsee for value, representing goods to have been shipped, shall be conclusive evidence of such shipment *against the master or other person signing the same*, notwithstanding that such goods may not have been shipped.

The learned Judge points out in very forcible language why the principle adopted as to bills of lading used in shipping should apply equally to documents of this description. The master of a ship, he points out, is necessarily clothed with a real as well as an apparent authority much more extensive than belongs to the station agents of a railway. His control over the vessel, his power to make contracts respecting it, his discretion in the use and management of it, for the benefit of the owners, on the high seas, and in distant ports, reach far beyond those of the latter. A bill of lading, as he points out, oftentimes arrives at the port of destination months before the vessel and cargo, and the necessities, as well as the convenience, of commercial transactions requiring its transfer and advances on the faith of it, are much stronger than can possibly exist in dealing with similar instruments in railway transportation.

The Supreme Court of the United States, in *Schooner Freeman v. Buckingham*, 18 How. 182, adopted the case of *Grant v. Norway*, and held that neither owner nor vessel was responsible to an innocent purchaser or holder of a bill of lading signed by the master for goods not actually shipped, and intended as an instrument of fraud; and they place their decision on the ground of *want of authority* in the master, who they say "has no more an apparent authority to sign bills of lading than he has to sign bills

of sale of the ship. He has an apparent authority, if the ship be a general one, to sign bills of lading for *cargo actually* shipped, and he has also authority to sign a bill of sale of the ship when in cases of disaster his power of sale arises, but the authority in each case arises out of, and depends on, a particular state of facts. It is not an unlimited authority in the one case more than in the other, and his act in either case does not bind the owner, even in favour of an innocent purchaser, if the facts upon which the power depended did not exist, and it is incumbent upon those who are about to change their condition upon the faith of his authority to ascertain the existence of all the facts upon which his authority depends."

The question was much discussed in *Griswold v. Haven*, 25 N. Y. 595, in which the majority of the Court held a firm of warehousemen liable for a false representation made by one of the firm to a person who advanced money on the faith of it; and again in *Farmers, &c., Bank v. The Butcher's Bank*, 16 N. Y. 125, in which the majority of the Court held a bank liable upon a cheque certified to be good by the paying teller, whose authority to certify was limited to cases where the bank had funds of the drawer in hand sufficient to cover the cheque.

The judgment of the dissenting Judge commends itself to my mind as more consistent with the established principles regulating the relations of principal and agent, and with the authority of decided cases in our own Courts.

I think it will be found upon a close examination of the cases in the English Courts which have been referred to, that the principals were held liable for the fraud of the agent in those cases only in which it was shewn that the representation or act complained of came within the scope of the agent's authority, or where the principal had accepted the benefit of it.

In *Mackay v. Commercial Bank of New Brunswick*, L. R. 5 P. C. 394, the cashier was shewn to have a much wider authority than those officers of a bank usually have. The president and directors appear, in fact, almost to have

delegated their powers to him. No question arose there as to the particular fraud complained of having been committed within the scope of his authority; and equally clear was it that the bank benefited by the fraud. Nevertheless the judicial committee were particularly guarded in avoiding any expression of opinion as to whether a fraudulent representation alone, without proof that the defendants had profited by it, or proof that the defendants with notice of the fraud had accepted the benefit, would have been sufficient to sustain the recovery. It was enough they said in that case to decide that the plaintiffs having established that they had suffered damage, and that the defendants commensurately profited by the fraudulent representation of the agent, made within the scope of his authority, were entitled to retain the verdict.

In what may be called the leading case of *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259, the agent was the manager of the bank, *the general agent of the company for the transaction of the business in the course of which the fraud occurred*, it was done in the interest of the bank, and they adopted it, if adoption were necessary to create a liability, by accepting the benefit.

Swire v. Francis, L. R. 3 App. 106, is the most recent exposition of the law on the subject, and at first sight would seem to support the plaintiff's contention, but on examination it seems to be decided on precisely the same principle as the two cases I have last referred to, and not to extend the liability of a principal beyond what is established, or confirmed rather, by the authority of those cases.

In that case the agent, who had the general charge of the defendants' business, made an entry in an account which he rendered to the plaintiffs crediting the defendants in account with the plaintiffs with a sum of money, which was in effect a representation that that sum had in the usual course of business been advanced by the defendants on certain goods intended for shipment, and he then drew a bill in the defendants' name upon the plaintiffs for the amount.

The agent had in fact prior to this transaction embezzled moneys of the defendants, and it was a device on his part to conceal his own embezzlement by replacing it with the plaintiffs' money.

The Court there held that it was within the scope of the authority of the agent, as that expression had been defined in many cases, to make out the account, to insert in it the advance made on goods on account of the plaintiffs, and to draw the bill for the purpose of covering the balance of the account. All this was in the ordinary course of business. *It would have been within the scope of his authority to make an advance of the kind and to enter it in the account when made*, and the case therefore fell within the principle already referred to in *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259, and the defendants got the money, the proceeds of the bill.

Then it is said that the railway company was held liable under similar circumstances in *McLean v. The Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 270, and that that being a decision of the Court of Appeal is binding upon us. The agent of the railway, as I understand that case, had been in the habit, with the company's knowledge, of granting receipts before the actual receipt of the grain, trusting to its being delivered in a few days. His agency, therefore, and power to deal in that way were recognized by the company, and there being a case to go to the jury as to such mode of dealing, the Court refused to disturb the verdict.

If it had been shewn that the defendants here recognized a course of dealing whereby bills of lading were given before the actual receipt of the grain, that would have been evidence of agency to deal in that way, and if he had then fraudulently issued such bills of lading, there would have been at least one of the elements referred to in *Mackay v. The Commercial Bank*, to create a liability.

The difficulty the plaintiffs unfortunately labour under here is that no such agency was shewn; what the agent did do was not within the scope of his authority; and as I

understand the cases the defendants cannot be made liable for a fraud committed by him under such circumstances.

Read in this light the extract referred to in the judgment of the Chief Justice from *Smith's Mercantile Law*. 9th ed., p. 120, seems to support the view I have been attempting to explain: "Where the authority is expressly given there can be no doubt of its extent, except from the uncertainty of words employed in delegating it. When, however, it is to be inferred from the conduct of the principal, that conduct furnishes the only evidence of its extent as well as its existence."

The authority here was well defined, and the company did nothing to induce persons dealing with them to suppose that he had any other authority. What was done here was "not in the *seeming* course of that employment."

The same remarks apply to the extract from Mr. Story's excellent work on agency.

I fully recognize the hardship of the case upon the plaintiffs, but it is one of those commercial risks which in defiance of all precaution will occasionally occur; I incline to think that to hold these defendants liable would be a terrible inroad upon the principles which have long been established regulating the liabilities of principals for the act of their agents, and might lead to results much more disastrous than those which will follow the decision which, in my judgment, should be given in this case.

Moss, C. J. A.—This case is interesting and remarkable not only for its great importance to our mercantile community, but for the extraordinary diversity of judicial opinion which its agitation has evoked both here and in the United States.

I confess that my own opinion has undergone many fluctuations, and that it is with great hesitation and difficulty I have arrived at a conclusion. It is almost superfluous to add that after examining the opposite and irreconcilable views of Judges equally entitled to respect for their great learning and ripe experience, I have not

succeeded in banishing all doubts from my mind. The authorities have been so exhaustively reviewed, and the opposing arguments so distinctly presented in the opinions delivered in the Queen's Bench and the Common Pleas, and by my learned brethren to-day, that I shall endeavour to compress my remarks into the smallest possible compass.

I start with the proposition that nothing turns upon the circumstance of the defendants being an incorporated company. They are in this suit to be dealt with, and made responsible for their agent, to the same extent and upon the same principles as if they were a natural person. The plaintiffs' rights are as ample as if the whole railway were owned by a private individual, residing in England, who had placed Carruthers in charge of the Chatham station, with all the powers and authority which he actually exercised. Among these was the authority to issue bills of lading for produce to be forwarded by the railway from his station, upon the faith of which documents the defendants must be taken to have known that advances of money might, and almost certainly would, be obtained. He was also authorized to issue bills of lading in exchange for shipping receipts granted by agents at less important stations, upon whom authority was not conferred to issue bills of lading directly.

If under these and the other circumstances already detailed in the judgments, a private person would be held responsible for such a fraud committed by an agent with the same duties and powers as Carruthers, these defendants are liable.

If I have succeeded in correctly analyzing the arguments used for the plaintiffs, they are reducible to two propositions, which, although somewhat interwoven in substance, it will be convenient to treat as distinct. One is, that the defendants are liable because the receipt of Carruthers was that of the company as fully as if the corporate seal had been affixed by proper authority. The other, that the defendants are liable, because they placed Carruthers in this position of trust, and thereby held out to the public that confidence might be reposed in his fidelity and integrity.

It seemed to be thought that by the first proposition the controversy was in some way translated out of the sphere of the law of agency, so as to break the force of decisions tending to limit the principal's liability. The process by which this result has been attained I have not succeeded in following. It may safely be conceded that if the receipt had been issued with the seal of the company attached by proper authority, or to get rid of any embarrassment occasioned by the presence of a corporation, let us say, if the receipt were that of the principal given *propria manu*, there would be the liability to make the representation good; but before that effect can be attributed to the receipt, the primary question must be determined, whether the signature of the agent is, under the existing circumstances, the signature of the principal, and the solution of that question must depend upon the established doctrines of the law of agency.

If the station master at Chatham had himself been the owner of the railway, and had given a bill of lading for flour not actually received, knowing that it was to be used for the purpose of procuring an advance from a bank, upon the discount of a draft which, in the ordinary course of business, the plaintiffs would accept and become liable to pay, I see no reason to doubt that he would be estopped from denying the receipt of the flour; but this concession in the plaintiffs' favour falls far short of establishing that the defendants are bound by these receipts. The question still is, Was the act of Carruthers their act? Was the use he made of these documents equivalent to the issue of receipts by his principal personally?

As in every case where the principal is made responsible for something done by his agent, it is because the act is deemed to be in law his own, it does not strike me that this mode of putting the ground of the defendants' liability does much towards simplifying the question.

The second proposition seems to be stamped with the authority of many eminent jurists in the United States. In the judgment delivered by Harrison, C.J., there is an extract

from *Story's Treatise on the law of agency*, 7th ed., sec. 452, in which it is laid down that the principal is liable in a civil suit for the frauds or misrepresentations of his agent in the course of his employment, although the principal did not authorize, or justify, or participate in, or know of, such misconduct, or even if he forbade the acts, or disapproved of them. The rule is said to be founded on public policy and convenience, because in no other way could there be any safety to third persons in their dealings directly with the principal, or indirectly with him, through the instrumentality of agents. The learned author adds emphatically that in every such case the principal holds out his agent as competent and fit to be trusted; and thereby in effect warrants his fidelity and good conduct in all matters within the scope of the agency. I have noticed similar expressions of opinion in judgments delivered in various Courts of the neighbouring country. It may be remarked in passing that it is not clear that, even when enunciating so broadly what he conceived to be the rule, he contemplated its extension to the case of an agent making the misrepresentation, or committing the fraud or other tort for some private purpose of his own. I think, indeed, that the tenor of his observations, when considered as a whole, leads to the conviction that he entertained no such opinion.

But be that as it may, I find no trace of any such doctrine in the English authorities, except what may be gathered from the observations in *Coleman v. Riches*, 16 C. B. 104, that, if there had been a contract that in consideration that the plaintiff would cause his purchases to be delivered at the defendants' wharf, the defendant would, on the receipt of the goods, give such vouchers as the plaintiff might act upon, then it might possibly be said that he had undertaken to employ competent persons faithfully to perform that duty. Even if the view be adopted that there is nothing in that decision inconsistent with the present plaintiffs' right to recover, it is still manifest that the above *dictum* is something very different from the proposition we are now considering. If

the terms of the proposition be scrutinized, it may, perhaps, appear open to the objection of vagueness and inconvenient generality. If it means no more than that the principal is liable for dishonest acts and fraudulent representations, made in the course of his employment, and in furtherance of his master's business, it adds nothing to recognized rules, which are expressed in terms with which every student of English law is familiar, and is simply a useless appendage to the list of legal formulæ, already sufficiently long. If it means that for every departure from honesty or breach of integrity, of which it may please the agent to be guilty for his own profit, the principal is to be liable, simply because the wrongdoer's position as agent gave him the opportunity and furnished him with the means of committing the fraud, it may lead to consequences from which its exponents would be among the foremost to shrink. Still, when the essence of the plaintiffs' case is extracted, it does really seem that it is under some such rule they must seek to find shelter and support.

Consider what was the whole wrong, if any, committed by the defendants. It was neither more nor less than placing Carruthers in a situation in which he was entrusted with certain powers, and given certain duties. This was the head and front of their offending. They did nothing else which led to the plaintiffs' injury. Unless, therefore, they are to be held to have given to the plaintiffs, as members of the community, a guarantee that he would not abuse these powers for his own fraudulent ends, it is not easy to comprehend on what ground their liability can be rested.

Before adopting a rule of such doubtful authenticity, it will be well to direct our attention to the recognized and established doctrines of our law touching the responsibility of principals for the wrongful acts of their agents. I say wrongful acts, because it is settled that there is no sensible distinction between their liability for false representations and other torts. Now I take it to be clear that in the first place the agent must be acting in the course of

his employment, or within the scope of his agency, in the commission of the tort; and secondly, that the tort must not be his own personal affair committed for the attainment of his private ends, or the gratification of his private objects. These are elementary principles, from which, as far as I know, there is no departure, even by a hair's breadth, in English or Canadian cases. If they are applicable here, and I see no reason why they should not be so, they are fatal to the plaintiffs' contention. Carruthers was acting entirely for his own benefit, and in order to effect his own fraudulent purpose. He was doing no act for the company, or for its benefit. He was not committing the fraud in order that it might gain an advantage, or accomplish some object not otherwise attainable. He was not acting for it at all, and therefore in this was not its agent. I cannot help thinking that he no more made his master liable than does the servant who takes his master's horses and carriage from the stable to drive upon his own errand, and while on the road runs into another vehicle. But without enlarging upon this topic, I content myself with saying that unless I am labouring under some misconception either as to the special facts of this case or the nature of the general doctrine, it seems to me absolutely decisive.

But when the case is viewed in the light of the authorities, which are most closely applicable, the plaintiffs' difficulties appear to be greatly increased. I agree with the Judges who think that the task of reconciling *Grant v. Norway*, 10 C. B. 665, with a recovery by the plaintiffs, is hopeless. It is true that distinctions, more or less marked, may be drawn between the duties and functions of the master of a vessel and an agent at a railway station, but I find that competent authorities differ upon the question of which possesses the larger powers, and which more fully represents his principal. At any rate it appears to me to be difficult to suggest any sound reason for holding the owner in that case irresponsible, and the railway company in this case liable. Each had placed an agent there who had

power to issue bills of lading for goods actually received. Each knew that such documents might be, and probably would be, used to obtain advances of money. And the one knew, as well as the other, that if the agent fraudulently issued a bill of lading innocent persons might be deceived and cheated. Certainly, if the doctrine is to be maintained that a principal must suffer where by the appointment and accrediting of an agent with certain powers, he has enabled him to commit a fraud upon an innocent person, the decision in *Grant v. Norway* was erroneous. But its authority has never been impeached or seriously questioned, and I take it that it must now be deemed to be firmly incorporated in our commercial jurisprudence. When the judgment, which was delivered after consideration and with an express recognition of the general importance of the question at issue, is examined, the *ratio decidendi* is, in my opinion, irreconcilably opposed to the present contention. It may not be inappropriate to remark here that the enumeration it gives of the powers of a master of a vessel leads to the reflection that his position is more analogous to that of the general manager of a railway, than to that of a station-agent.

The ship and the railway are alike the instrumentalities used for the transport of goods. Each is a complete whole, of which the general direction and management has been confided by the owner to a particular person—in the one case, to the master, in the other to the general manager. The master is said to be the *general agent*, to perform all things relating to the usual employment of his ship. Caruthers can scarcely be said to have been the general agent to perform all things relating to the usual employment of the railway. The gist of the judgment, as I read it, is, that all parties have a right to assume that an agent has authority to do all which is usual, but that it is not usual for the master to give a bill of lading for goods not put on board; and that if from the usage of trade, and the general practice of shipmasters, it is generally known that the master derives no such authority from his position as

master, the case might be considered as if the party taking the bill of lading had notice of an express limitation of the authority, in which case he could not claim to bind the owner by a bill of lading signed, when the goods therein mentioned were never shipped. If that reasoning be sound, the present plaintiffs would seem to be affected with notice of a similar limitation of the authority of Carruthers, for it cannot be contended that it is usual for a station agent to issue bills of lading for goods not actually received, or that he derives any such authority from his position. It may be that the reasoning in the case is exposed to the criticism that it places too much stress upon the real and actual, to the disregard of the apparent authority; but I do not think that if the same point were presented for our consideration, we would refuse to recognize its authority. It may be added that it has been followed in the Supreme Court of the United States.

The next case on which I desire to observe is, *Coleman v. Riches*, 16 C. B. 104. I have not been able to convince myself that there is any solid distinction between it and the case with which we are now engaged. There the defendant had authorized an agent to issue receipts for goods actually delivered. He knew that the plaintiff was in the habit of acting upon these by paying money to the vendors. He knew that in the case of any particular receipt, it was probable, and almost certain, that the same course would be adopted. He must have known, if the question ever crossed his mind, that if his agent issued a false receipt the plaintiff would probably act upon it to his prejudice, by paying the vendor in the belief that the goods had been delivered. I should say that, under this state of facts, he vouched for and accredited his agent, as fully as the defendants did Carruthers. They knew that the documents which they authorized him to issue might be, and almost certainly would be, used to obtain advances, but I do not see that they had any higher degree of certitude than had Riches. It was, indeed, intimated, as I have already pointed out, that if there had been a contract to

the effect that, in consideration of Coleman causing his purchases to be delivered at the wharf of Riches, the latter should give vouchers which might be acted upon, then the result might be different; and it is suggested that the elements of such a contract are to be discovered in the present case. I cannot think that there are satisfactory grounds for adopting that view. The defendants here informed the public that bills of lading would be issued from Chatham station by Carruthers, their agent, and they knew that the usage of trade made it probable, and the law of the land made it allowable, that advances should be obtained thereon; and that if Carruthers issued false receipts, banks or capitalists might be defrauded. But was not the position of Riches precisely the same in its essential characteristics? He informed Coleman that receipts could be given by the agent, and he knew that Coleman was likely, in accordance with his custom, to pay money upon the presentment of such a receipt, and that if a false receipt were given Coleman was almost certain to be injured.

If the company are to be held to have contracted with the plaintiffs, as a part of the general public, for the employment of trustworthy agents, I do not see why Riches should not have been under the same obligation to Coleman.

In the later cases I think there is a steady recognition of the principle to which I have already adverted, that the master is to be held liable when the servant is acting for him, and not for himself. For instance, that is expressly kept in view by Willes, J., in *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259, for he states the general rule to be, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit. It is true that he further observes that in such cases, while the master has not authorized the particular act, he has put the agent in his place to do that class of acts, and must be answerable for the manner in which the agent has conducted himself.

in doing the business which it was the act of his master to place him in. But reading his whole judgment I do not entertain the slightest doubt that he intended this observation to be strictly confined to cases where the agent is acting for the principal, and conducting some business for his benefit.

Nor do I find in *Mackay v. Commercial Bank of New Brunswick*, L. R. 5 P. C. 394, a single expression which rightly considered is in conflict with the opinion I have formed. On the contrary, the Court stated it to be the law that a principal is answerable, where he has received a benefit from the fraud of his agent acting within the scope of his authority, and the point finally decided was that the plaintiffs having established that they had suffered damage, and that the defendants had commensurately profited by the fraudulent representation of their agent made within the scope of his authority, were entitled to maintain their verdict.

Upon the true significance of that decision I cannot do better than again refer to the judgment of Mr. Justice Gwynne, in *Oliver v. Great Western R. W. Co.*, 28 C. P. 143.

In the argument reliance was placed on the recent case of *Swire v. Francis*, L. R. 3 App. Cas. 106, decided by the Judicial Committee of the Privy Council, but when examined it appears simply to adopt the principles enunciated in *Barwick v. The English Joint Stock Bank*, and *Mackay v. The Commercial Bank of New Brunswick*. Indeed, the case did not differ in substance from an action for money had and received.

But without dwelling any longer upon the authorities, which have been reviewed with the greatest acuteness and ability in both the Courts of common law, I shall simply express my opinion that in every instance where the principal has been held liable, either the misrepresentation had been made, or other wrongful act committed, by the agent in the usual course of his employment, within the scope of his authority, and for the benefit of his master, or the master had authorized, sanctioned or ratified it. I do not

think that, entertaining this view, I would be justified in stretching the doctrine beyond these settled boundaries.

I am not insensible to the commercial inconveniences and derangements of the course of trade which may follow if the opinion of myself and those with whom I am in accord should prevail. I fully realize the serious difficulties that may interfere with the transport of the produce of the country if consignees cannot trust in bills of lading, which appear to be issued by a railway company, and bear every mark of genuineness. But if we have rightly appreciated the existing law, it is for the correcting hand of the Legislature to apply the needful remedy.

I cannot accept the suggestion that in such a case it is for the Courts to enlarge or expand established doctrines in order to meet what are supposed to be new exigencies.

It is not a little curious to notice precisely what Carruthers did in this matter, and to endeavour to fix the point at which his wrongdoing commenced. In procuring Neville to sign the bills of lading or receipts, he was not actually doing more than wasting so many of the company's forms. It is true that he was then starting the train of circumstances which was to end in the plaintiffs being defrauded. But if he had repented before acting, or if the bank had declined to cash his drafts, no mischief would have been done. The first overt act of fraud was the use of the receipts to obtain money from the bank.

Now, the manager knew perfectly well that Carruthers was to all intents T. Brown & Co. Therefore when he accepted these receipts he knew that they represented nothing more than that Carruthers, the miller, had delivered to Carruthers, the railway agent, a certain quantity of flour. In what capacity was Carruthers acting when he first committed the direct fraud which led to the plaintiffs' injury? Certainly as T. Brown & Co., and not as the defendants' agent. I have grave doubts whether the bank could possibly on this state of facts, and apart from any other objection, have fastened any responsibility upon the defendants, and if they simply passed on the representation to the plaintiffs, it may be that they occupy no better position.

Again, as the plaintiffs' right was rested upon the ground of estoppel, it is a fit subject for enquiry to what extent they relied upon the representation with which the defendants are charged. I cannot help thinking that it was not upon the receipts they really relied. They knew nothing of the genuineness of the signature. They were wholly unacquainted with the existence of any power by Neville to sign. They saw no more than that the receipts were upon the usual form, with which they may be supposed to have been familiar, but for all they could tell from a mere inspection the forms might have been abstracted from the company's office, and filled up by a stranger.

It appears to me that what they really relied upon was the usual course of business. They assumed—indeed, the form of the transaction made them pretty certain—that a bank had advanced money upon the drafts secured by the bills of lading, and they took it for granted that the bank would not have so acted unless these documents were genuine.

Neither of these two points was discussed at the bar and it may be that they are of no moment. They do not form any material element in my judgment, but as I have given them some consideration, I did not wish to leave them wholly unnoticed.

As the Court is thus equally divided, the appellants fail, and their appeal must be dismissed, with costs.

Appeal dismissed.

WORSWICK V. THE CANADA FIRE AND MARINE INSURANCE COMPANY.

Fire Insurance—Condition—Warranty.

The plaintiff, who resided at a distance from a mill on which he held a mechanic's lien, applied to the agent of the defendants to effect an insurance thereon. One of the questions put to the applicant was, "Is a watch kept on the premises during the night? Is any other duty required of the watchman than watching for the safety of the premises? Is the building left alone at any time after the watchman goes off duty in the morning till he returns to his charge at night?" His answer was, "The building is never left alone, there being always a watchman left in the building when not running." At the foot of the application was a condition that the foregoing was a full and true exposition of all the facts and circumstances in regard to the condition, situation, and value of the property, so far as was known to the applicant, and material to the risk. The policy which issued thereon mentioned the application in these terms, "Special reference being made to the assured's application, which is his warranty and a part hereof." One of the conditions of the policy provided that any changes material to the risk and within the control or knowledge of the insured should avoid the policy unless notified to the company. When the application was made, a watchman was kept on the premises, but after the issue of the policy, and without the knowledge of the assured he was discontinued.

Held, (affirming the decree of Proudfoot, V. C., 25 Gr. 282,) that the answer was not a warranty that a watchman would be kept during the existence of the policy, but merely a representation as to an existing state of things at the date of the application.

Held, also, that even if the withdrawal of the watchman was a change material to the risk, the assured was not responsible, as it was not within his control or knowledge.

This was an appeal from a decree of Proudfoot, V. C., reported 25 Gr. 282. The facts are fully stated there, and in the judgments in this appeal.

The appeal was argued on the 17th May, 1878. (a)

Osler, Q. C., and *G. E. Patterson*, for the appellants.

The plaintiff clearly warranted that a watchman would always be in the building when the mill was not running, and such a warranty was a continuing warranty, and should have been strictly observed: *Whitlaw v. Phoenix Ins. Co.*, 28 C. P. 53; *Abrahams v. Agricultural Mutual Ins. Co.*, 40 U. C. R. 175; *Garrett v. Provincial Ins. Co.*, 20 U. C. R. 200; *Allen v. Thornton*, 3 E. & B. 868; *Hopkins v.*

(a) *Present*.—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

Provincial Ins. Co., 18 C. P. 80; *First National Bank v. Ins. Co. of N. A.*, 50 N. Y. 45; *Glendale Woollen Co. v. Protection Ins. Co.*, 21 Conn. 19; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136. The defendants are not seeking to avoid the policy under the third statutory condition which is printed upon the policy. That condition merely specifies one of the events which if they happen would avoid the policy, but the defendants do not set up that there was any change material to the risk of which the plaintiffs neglected to notify them. The Court will give effect to every part of the contract when there is no direct contradiction between the parts; and an express warranty cannot be controlled by a condition, which does not particularly refer to the subject of the express warranty: *Confederation Life Association v. Lefto*, 6 Insurance L. Journal 257; *Jeffries v. Life Ins. Co.*, 22 Wall. 47; *Aetna Ins. Co. v. France*, 91 U. S. R., S. C., 512; *Stokes v. Cox*, 1 H. & N. 533. The warranty was a condition precedent to the making of the contract, and the statutory condition cannot be read as limiting the warranty. If, however, the warranty and statutory condition are to be read together, then the warranty must be read as a variation and limitation of the statutory condition. There was no sufficient evidence that the plaintiff had acquired and established his alleged lien upon the property insured. The decree of the Court in a cause to which the defendants were not parties could not bind them, and there was therefore no proof that he had at the time of the fire any insurable interest in the property. They also referred to *Whitlaw v. Phoenix Ins. Co.*, 28 C. P. 53; *Harrison's Digest*, 286, 287; *Gripley v. Astor*, 17 Howell 44; *Taylor on Evidence*, 1482-1483, 6th ed.

Blake, Q. C., and *Kerr*, Q. C., for the respondents. The fact that the plaintiff had a mechanics' lien on the property in question was clearly established by the decree, report and proceedings in the suit of *Worswick v. Slaght*, which were put in at the hearing. The answer to the question in reference to the watchman was not a warranty; it was merely a representation of an existing state of circum-

stances, and was correct at the time it was made. It was known to the agent that the plaintiff was insuring property over which he had no control, and under such circumstances it cannot be held that he intended to warrant that a watchman would always be kept on the premises. It is quite clear that the third statutory condition is not confined to structural changes, and the company themselves have so interpreted it in this very policy by varying it so that it might apply to a change in the occupancy. This condition controls the application, and shews that the plaintiff was only covenanting as to matters within his knowledge and under his control. The evidence here establishes that he had no knowledge of the removal of the watchman, and that he had no control over him. They referred to *Andes Ins. Co. v. Shipman*, 77 Ill. 189; *Lycoming Ins. Co. v. Mitchell*, 48 Penn. 367; *Chamberlain v. The New Hampshire Fire Ins. Co.*, 55 N. H. 249; *Loud v. Citizens' Mutual Ins. Co.*, 2 Gray 221; *Mechanics' Building Society v. Gore District Ins. Co.*, 40 U. C. R. 220; *In re Universal Non-Tariff Fire Ins. Co.* L. R. 19 Eq. 485.

23rd December, 1878 (a). Moss, C.J.A.—The first ground of objection taken to the decree of the Vice-Chancellor, is in effect that the plaintiff has not shewn that he had at the date of the policy an insurable interest. The interest which the defendants professed to insure was what is known as a mechanics' lien. The answer somewhat faintly denied the existence of this interest by alleging that the defendants "do not admit that the plaintiff has a valid lien on said property under the Mechanics' Lien Acts in force in this Province to the amount insured by the said policy, or to any amount." It may be thought that it is scarcely fair of the defendants now to attempt to avail themselves of this objection, when it is observed from the correspondence that the defendants required what they designated as

(a) *Present.*—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

“a certified copy of the lien” to be attached to the proofs, and that upon the documents verifying the claim being received, this requisition having been complied with, no complaint is made with reference to the plaintiff’s title but the refusal to pay is rested exclusively upon the other defence, to which I shall presently refer. I should infer from the judgment of the learned Vice-Chancellor that the point was either abandoned, or not much insisted upon, at the hearing.

At the close of the plaintiff’s case, counsel submitted that the lien had not been proved, upon which the learned Judge observed that there appeared to be sufficient *prima facie* evidence, but that it was open for the defendants to shew that there was no lien at the time for the purpose mentioned. For the defence, Slaght was called, and some questions were directed to this subject, but nothing of importance was elicited; and so far as appears from the appeal book, the objection was not renewed. No reference is made to it by the Court; on the contrary, the judgment commences with the statement that “the plaintiff had a mechanic’s lien.” But if the objection is still open, I am of opinion it cannot be sustained. The plaintiff put in evidence a bill in Chancery claiming such a lien, which was filed in its original form on the 21st day of June, 1876, the answer of Slaght, the owner of the premises for whom the work was done, filed on the 6th day of December, 1876, the decree establishing the lien, dated the 4th day of June, 1877, and the Master’s report finding the amount due to the plaintiff, dated the 6th day of November, 1877.

The plaintiff’s application to the defendants bears the date of 27th November, 1876, and the policy issued on the 1st of December. Now, it is quite true, as was urged on behalf of the defendants, that the proceedings in Chancery are *res inter alios actæ*, but the documents produced are the appropriate evidence of the fact that such proceedings were taken. When that is connected with the other testimony it seems to be quite sufficient. The plaintiff himself proved that the machinery, in respect of which the lien is

claimed, was put in about the 20th June, 1876, and that proceedings were taken to establish it "almost immediately after" the work was finished. They were commenced, to quote the plaintiff's own words, "Just as soon as I could do it, and when I found out that I could not get my money."

From the proofs of loss furnished by the plaintiff, and produced by the defendants, it appears that on the 21st June, 1876, a statement of claim was filed in the proper registry office. I entertain no doubt that the learned Vice-Chancellor was quite right in holding that the plaintiff had made out a sufficient *prima facie* case, and that this objection was properly overruled.

The second objection to the plaintiff's recovery is in effect that it was one of the conditions of the defendants' liability that a watchman should be kept upon the premises, and that this condition was not fulfilled. The circumstances under which this objection is raised are peculiar. The plaintiff, who lived in Guelph, mentioned his intention of insuring to the defendants' local agents. As the property is situated in Woodstock, the plaintiff did not possess the information requisite for filling up the application. The agents, however, told him that they would "fix it," and accordingly they communicated the matter to the head office at Hamilton, whence instructions were sent to the defendants' agent at Woodstock. This agent called upon Slaughter, the owner of the premises, and filled up a form of application in accordance with the information he received. This form was then sent from the head office to Guelph, where it was signed by the plaintiff in reliance upon its correctness. It contains a large number of enquiries under the following heading :—

"The applicant will answer the following questions and sign the same as a description on which the insurance is to be predicated." Among them is that upon which this controversy turns. "WATCHMAN.—Is a watch kept upon the premises during the night? Is any other duty required of the watch than watching for the safety of the premises?"

Is the building left alone at any time after the watchman goes off duty in the morning till he returns to his charge at evening?" To this the following answer had been written down by the Woodstock agent: "The building is never left alone, there being always a watchman left in the building when not running."

At the foot of the application is subjoined an agreement that the foregoing is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation and value of the property to be insured, so far as the same are known to the applicant, and material to the risk. Upon this application the defendants issued their policy, which mentions the application in these terms: "Special reference being made to the assured's application, No. 232, which is his warranty and a part hereof."

Among the conditions endorsed, is the 3rd of the Statutory Conditions, namely: "Any change material to the risk and within the control or knowledge of the assured, shall avoid the policy as to the part affected thereby, unless the change be promptly notified to the company." The building was burned on the 3rd of February, and no watchman seems to have been kept on the premises since the previous 29th December. Upon this state of facts it is argued that the plaintiff has lost the benefit of his policy.

The defendants' contention is, that the answer with respect to the watch upon the buildings amounts to a warranty that the building should never be left alone, and that a watchman should always be there when it was not being worked. It is claimed to be a promissory warranty, a description, which seems to be sanctioned by usage—at least on this side of the Atlantic—but which does not strike my mind as being very felicitous. At any rate the name does not possess any charm which need prevent us from regarding the substance of the transaction.

Now, I am content to leave almost unnoticed the circumstance that the answer out of which this promissory warranty is sought to be constructed, was really that of the defendants' agent. I assume that it was for the defen-

dants, as a respectable company, to determine how far that consideration should influence resistance to the plaintiff's demand.

Then treating the answer as emanating from the plaintiff, we are to ascertain upon what legal principles its character is to be metamorphosed from that of a reply upon a matter of fact, to that of a covenant that the existing state of things shall be continued. The learned counsel for the defendants were able to direct our attention to many cases decided in the United States where that effect was attributed to similar answers, but the diligence of the plaintiff's counsel placed before us other opinions in cognate Courts where the doctrine received much qualification.

The cases in our own Courts of *Abrahams v. The Agricultural Mutual Ins. Co.*, 40 U. C. R. 175, and *Whitlaw v. The Phœnix Ins. Co.*, 28 C. P., 53, were also relied upon by the defendants. The first decision has no application to the question we are now considering. The policy there contained an absolute and unmistakeable condition against leaving the premises unoccupied, and the company were not forced to attempt to spell out a special contract from the application.

In the second case the action was upon a policy effected by Slaght upon these same premises. The application, by which it was contended the plaintiff was bound, enquired whether a watchman was kept on the premises at night and at all other times when the works were not in operation, or when the workmen were not present, and the reply was a simple affirmative. At its foot was an undertaking identical with that given in the present plaintiff's application, with the addition of an agreement that the same should be held to form the basis of the liability of the company, and should form a part and be a condition of the contract. As the policy in this case incorporates the application, there does not seem to be any appreciable difference between the respective contracts.

Mr. Justice Gwynne, who delivered the judgment of the Court, expressed the opinion that the keeping of a watch-

man was a circumstance so material to the risk proposed, and the answer to the query was a representation so essentially affecting the contract, and conducive to its being entered into, that it must be held to be a warranty. It was also laid down that the statement that a watchman is kept on the premises was a continuing representation intended to express a continuous ever-existing practice, which, to be of any avail in a matter so material to the company, must be treated as continuing during the continuance of the policy. This mode of treating the subject is in accordance with the general, although not unbroken, current of American authority. Now, I have no intention of impugning the correctness of that decision. On the contrary, I think that when the statement is read in connection with the condition prohibiting any change material to the risk within the control or knowledge of the insured, it would be proper to hold that his withdrawal of the watchman avoided the policy. But I venture to think, (although I express my views with much diffidence) that the soundness of the reasoning frequently adopted in such cases is open to doubt.

In its practical consequences, its departure from sound principles of interpretation, (if there be such a departure) is less important, where the question concerns the keeping of a watch, than in many other matters dealt with by the application. That circumstance, however, cannot be a ground for applying a different rule of construction.

Now, it seems to me that the process of reasoning which has been adopted, is something very diverse from that applied to the interpretation of ordinary contracts. The company has chosen to ask a great variety of questions to aid it in arriving at a conclusion whether it shall accept or decline the application. It has stipulated that the answers are to be signed as a *description* upon which the insurance is to be predicated.

It has taken the further precaution of exacting a stipulation that the application contains a just, full and true exposition of all the facts and circumstances in regard to

the condition, situation and value of the property, so far as the same were known to the applicant and material to the risk ; and in the policy it is careful to include a special reference to the application, and to declare that it is the warranty of the insured, and made part of the instrument. But in all this there is not the slightest trace of a requirement that the existing state of things shall be continued without alteration. There is an emphatic demand upon the applicant to give full and true information, to misrepresent nothing and conceal nothing. He is told plainly that to the truth of his statements he will be strictly held ; but he is not informed that if he makes any change it is at the peril of forfeiting his policy. That is a consequence which is imported into the contract by construction. It is said that not only the information, but the continuance of the practice, is highly important to the insurer, and hence an agreement by the insured is implied.

I confess that I have difficulty in apprehending distinctly upon what principle this addition should be made to the express contract in favour of the insurer. It seems to proceed upon the view of the materiality to the company of such a condition. But I think insurance companies can be very safely left to insert in express terms in their policies what they deem to be material for their protection.

It appears to me that it would be more in accordance with the ordinary mode of interpreting obligations to say that it was for the company, after having received the information they sought as to the existing condition of things, to make its continuance a plain and express condition of the policy. If any rule for the construction of a contract of fire insurance can be deemed firmly established, it is that while its stipulations are to receive their full legal effect in order to guard the insurer against fraud and imposture, it is to be liberally interpreted in favour of the insured, so as not to destroy, without plain necessity, his claim to indemnity.

It may be thought that this rule is somewhat overlooked, when there is introduced into a policy thickly studded with

express conditions an implied one binding the insured to a certain course of action, simply because that appears to be material to the interest of the insurer, and because presumably the object of the question was that some engagement might be insisted upon with respect to the protection of the premises. An additional reason for not raising an implied contract from a statement embodied in an application may perhaps be found in the familiar fact that this document is in the custody of the company, and not of the insured.

I may add that the tendency of recent decisions in the United States appears to be opposed to finding constructive warranties in the statements made by the applicant.

But even if it is reasonable, when the insured is himself the owner or occupant of the premises, to treat his answer as equivalent to a promise to keep a watchman, I am of opinion that upon the actual facts of this case any such doctrine would be highly unreasonable. This engagement is added to the express stipulations of the contract, only because it is deemed to be consonant to the real intention of the parties. The circumstances here demonstrate that neither party contemplated for an instant that the plaintiff should keep a watchman upon the premises. The defendants knew that he resided at a great distance; that his whole interest was a lien; that he had no right to the possession of the premises, and could not exercise any control over their use. Their own agent had filled in this answer. Can it be plausibly contended that they ever supposed, or entered into the contract upon the supposition, that the plaintiff was to keep a watchman, or that his policy was to be forfeited if Slaght withdrew the watch? Is not the reasonable interpretation that they obtained information as to Slaght's custom, and took the risk that it would be continued? I think that only one answer is possible, and that on that consideration alone the plaintiff is entitled to succeed.

But the strength of his case is not exhausted. It may be conceded that if there was an absolute condition

that any change material to the risk, if not communicated, would terminate the liability of the company, and that the withdrawal of the watchman would be such a change. It may be that by coupling such a condition with the application, the company could hold the plaintiff bound to see that a watchman was kept upon the premises. But the condition upon this policy is limited to changes within the control or knowledge of the assured. The withdrawal of the watchman was not within the plaintiff's control, and was without his knowledge. For such an alteration in the risk he was not responsible, and in my opinion it did not avoid his policy.

PATTERSON, J. A.—The plaintiff files his bill asking for payment of his loss under a policy of the defendant company, insuring him in respect of his interest as holder of a mechanics' lien on machinery in a mill of one Slaughter, at Woodstock.

The defendants do not admit the lien, but it is proved by abundant evidence.

The defence mainly relied on is set out in the third paragraph of the answer. This paragraph alleges that the plaintiff in his written application for the insurance in answer to the questions, "Is a watch kept upon the premises during the night? Is any other duty required of the watchman than watching the safety of the premises? Is the building left alone at any time after the watchman goes off duty in the morning till he returns to his charge at evening?" made the following statement: "The building is never left alone, there being always a watchman left in the building when not running." A question is raised as to how far this may, under the circumstances of this case, be truly said to have been the answer of the plaintiff and not that of the defendants' agent at Woodstock; but passing that over, the allegation in the defendants' answer may be said to be literally correct.

It is then further alleged that the plaintiff, in and by the application, which in the policy is stated and provided

to be his warranty and a part of the policy, covenanted and agreed to and with the defendants that all his answers in the application gave a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation and value of the property to be insured, so far as the same were known to him and material to the risk. Looking at the application and the policy we find that (apart from the inaccurate use of the word "covenanted") this allegation is also true.

Then the paragraph proceeds to state that the plaintiff in his application agreed that the insurance he was seeking should be *predicated* upon the answers given by him therein. Now if this word "predicated" has the same meaning in the pleading as when used in the application, then the allegation is untrue. The applicant says nothing on the subject in his application; but he is addressed in it by the company in these words: "The applicant will answer the following questions and sign the same *as a description* on which the insurance is to be predicated." He is thus merely asked for the materials of *a description* of the property, to which the process of predication, whatever that is, is to be applied.

Then the paragraph, after reiterating that it was provided in the policy that the application should be a part thereof, and the warranty of the plaintiff, concludes by averring that at the time of the fire, and at a time when the mill was not running, there was no watchman, and this is true.

The statutory conditions are endorsed upon the policy. The third condition, which avoids the policy in case any change material to the risk and within the control or knowledge of the assured takes place, unless notified to the company or its local agent, is varied by an addition defining certain things as being material, which is the only variation or addition as far as shewn by the printed appeal book.

The plaintiff had, as requested by the company, answered questions as a description of the property; and, amongst other things, he had described the mill, and described it

correctly, as being always watched when not running. In this particular a change was afterwards made by the discontinuance of the watchman. Whether this change increased the risk or not, is a question of fact, not of law, and what evidence there is on the subject does not of necessity shew that the risk was increased. Slaght states that the watchman was kept as long as they had a fire about the premises, but that when they were not running, and had no fire about the premises, he did not deem it necessary to keep on a watchman. Now, the answer was, that the watchman was kept *in* the mill. His very presence there might have been a source of danger, as he must have had fire and light all the time from 15th December, when he was discontinued, till 4th February, when the fire occurred. The very form of the answer, that the watchman was kept *in* the mill, indicates what is explained by Slaght's evidence, that he was there to guard against fire from within, not against incendiarism from without; although his presence might of course have afforded some protection against that.

But even if we assume for the moment that the change was material to the risk, there is no pretence whatever for saying that it was within the control or knowledge of the assured; and therefore it did not affect the policy under the terms of the third statutory condition, or under the variation printed with it.

But the defendants contend that something in the application, or in the application and the policy together, avoids the policy which the statutory condition leaves good and valid. It is not quite correct to speak of the application and the policy as two instruments, because, as we are twice reminded in the third paragraph of the answer, the application is made a part of the policy. We have thus the situation pointed out by Mr. Blake, in his argument before us. We have the statute (R. S. O., ch. 162, sec. 3,) declaring that the statutory conditions shall, *as against the insurers*, be deemed a part of the policy, and sec. 5, that no variation, addition or omission, shall be legal or binding

on the insured unless indicated in the way directed by the fourth section; and that unless variations are so indicated, the policy shall, as against the insurers, be subject to the statutory conditions only. We have the condition which avoids the policy only in case the change is within the control or knowledge of the insured, as well as material to the risk; and we have the contention advanced by the defendants that the policy contains a provision under which it is avoided by a change that was not within the control or knowledge of the insured, and is not shewn to have been material to the risk.

If the policy contained such a provision as that which is assumed as a foundation for this contention, it would, in my opinion, be incumbent on us to decide against the contention. To hold otherwise would be to countenance an evasion of the clear declarations of the statute. But in truth the policy contains no such provision. The representation made in the answer respecting a watchman was true. It was made in reply to a question in the present tense, and was answered in the present tense.

It is now contended that the direct statement of the fact as it existed, was equivalent to an undertaking that it should continue unaltered. I am not aware of any principle which requires the language employed in or about an insurance contract to receive a construction different from what would be applied to the same language used in any other contract. Yet we are asked to apply in favour of these defendants a rule of interpretation which could not be generally applied without destroying all certainty in the reading of written instruments.

It is a trite observation that the parties could, if such was their intention, have expressly provided for what we are now asked to import by implication. It is also a needless observation; because they have made the express provision by the condition that a change in the state of things represented by the application shall avoid the policy unless notified, &c., provided the change is material to the risk and within the control or knowledge of the insured.

Reading the application and policy as one, the proposition takes this intelligible and reasonable shape. "You warrant that the premises are in the condition described, and that amongst other things it is the practice to keep a watchman in the mill whenever it is not running: "we insure you, and agree to pay whatever loss may happen by fire, provided things are now as you describe them, and provided you notify us of any change which may be material to the risk, and within your control or knowledge."

The plaintiff is thus entitled to recover upon the clear terms of the contract. It becomes unnecessary to inquire whether the description, if standing by itself, could, upon any fair principle of construction, be held to include an undertaking that things should remain unchanged, or whether the risk of change was not one of the hazards insured against; whether, in other words, that rather intangible sort of engagement could be deduced, which is said to be possible under the name of a promissory warranty—one of those confidences in which so much more is meant than meets the ear, that a man who has to the extent of his knowledge and understanding made a clean breast of it in reply to everything asked of him, is said to have undertaken things that were never suggested, and which he never thought of.

Some cases were cited to us on this subject. I do not intend to discuss them, or to do more than remark that looking at these cases and at others, principally American, in which the subject has been considered, and having regard to the circumstances of the particular cases, and the provisions of the policies which came in question, the current of authority is not clearly in support of the defendants' contention.

I refer, for an instructive discussion bearing on the view I take of this application and policy, to the judgment of Chief Justice Marshall of Kentucky, in the case of *Kentucky and Louisville Mutual Ins. Co. v. Southard*, 18 B. Monroe, 637, which is quoted in *May on Insurance*, sec. 163.

I think the appeal should be dismissed.

BURTON, J. A.—I am also of opinion that the judgment of the Court below was right and should be affirmed, and I place my decision on the short ground that it would be unreasonable to suppose that either of the parties to this contract could have intended that the words used in the application should be construed as anything beyond a statement of the facts existing at the time the application was made.

It is, no doubt, sometimes difficult to determine whether statements used in an application and incorporated in a policy are merely to be regarded as descriptive of the then condition and position of the premises, or whether they are to be construed as warranties of the future management and use of them ; but in all cases it is a mere question of interpretation to be ascertained in the same manner as in other contracts.

The question in the application in the present case, and the answer of the plaintiff, were confined in terms to the state of things then existing, and point only to the fact that there was at that time a watchman always left in the building when not running. The defendants were aware that the plaintiff had no control over the building, and was insuring only in respect of his interest under the Mechanics' Lien Act. Whilst they might desire to be informed of how the premises were managed before they would undertake the risk, they were quite aware that the plaintiff could not in any way control the future management of them.

Is it reasonable to assume that if they had inserted a stipulation in the policy in express terms that the building should continue to be watched as theretofore, that the plaintiff would have accepted such a security with the knowledge that the owner, over whom he had no control, might the very next day remove the watchman ? It is a well understood canon of construction that a warranty will not extend to anything not fairly within its terms, and will not be extended by construction.

I come to the conclusion, therefore, that there was no design on the part of either of the parties to this contract to

make the answer an executory stipulation by which the plaintiff was to be bound after the policy was issued.

I agree, therefore, with the learned Chief Justice, that the appeal should be dismissed, with costs.

MORRISON, J. A., concurred.

Appeal dismissed.

M'LEISH V. HOWARD.

Action against Division Court clerk—Money had and received—Notice of action.

The defendant, clerk of the Division Court of York, sent a transcript of the entry of a judgment recovered therein by the plaintiff to one M., the Division Court clerk of Essex, with directions to remit the money by post-office order or by cheque. M. having recovered the money paid it into his private account at McG. Bros. private bankers, and sent their cheque to the defendant for the amount, as he had been accustomed to do, which the defendant acknowledged in the following words: "McLeish v. Richards, received from the D. C. clerk, Windsor, \$70.40." Before the cheque was presented McG. Bros. failed, and the plaintiff sued the defendant for the money.

Held, reversing the judgment of the County Court, that the cheque and receipt operated as payment between M. and the defendant, and that the plaintiff was entitled to recover the money from the defendant as money received to his use.

Held, also, following *Dale v. Cool*, 6 C. P. 544, that no notice of action was necessary.

This was an appeal from the County Court of the County of York, making absolute a rule *nisi* to enter a verdict for the defendant. The facts are fully stated in the judgment.

The case was argued on the 12th November, 1878 (a).

J. E. Rose, for the appellant. F. Osler (A. Galt with him), for the respondent.

The following cases were cited: *Dale v. Cool*, 6 C. P. 545; *Harrison v. Brega*, 20 U. C. R. 324; *Cairns v. City*

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of *Ottawa*, 25 C. P. 551; *Harrold v. Corporation of Simcoe*, 16 C. P. 43; *McDougal v. Peterson*, 40 U. C. R. 101; *Griffith v. Taylor*, L. R. 2 C. P. D. 201; *Hall v. Moss*, 25 U. C. R. 263; *Carey v. Lawless*, 13 U. C. R. 285; *Sweeney v. Port Burwell Harbour*, 17 C. P. 574; *Johnston v. Graham*, 14 C. P. 9; *Wilson v. Mayor of Halifax*, L. R. 3 Ex. 119; *Byles'* 12th ed., 218; *Hughes v. Buckland*, 15 M. & W. 346 *Chitty*, 11th ed., 251; *Addison on Contracts*, 4th ed., 311.

December 6, 1878 (a). PATTERSON, J. A., delivered the judgment of the Court.

The first count sets out that the plaintiff, on the 9th May, 1877, recovered judgment in the First Division Court of York against one Richards for \$80.62, and directed the defendant, who is the clerk of that Court, to forward a transcript of the entry of the judgment to the clerk of the Seventh Division Court of Essex: that the defendant did so, and by a memorandum endorsed on the transcript directed the last-named clerk to remit all moneys which he should receive under the transcript to the defendant by post office order or otherwise, and also by a postal card directed to him to send the money by post office order or by cheque: that the clerk in Essex received \$70.40 from the judgment debtor, and remitted it by a cheque drawn by McGregor Bros., private bankers at Windsor, in Essex, on the Molsons Bank at its branch in Windsor: that the defendant neglected to present the cheque within a reasonable time, and that, before it was presented, McGregor Bros. became insolvent, and the cheque was dishonored.

There is a second count for money received by the defendant to the use of the plaintiff.

The contest at the trial was chiefly concerning the charge of negligence. A good deal of evidence was taken respecting the circumstances of McGregor Bros.; and, besides ob-

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jections urged on legal grounds against the defendant's liability for negligence, it was contended that he was entitled to notice of action, because whatever he did or omitted to do was done or omitted as clerk of the Division Court, and because the count charges him in that character.

The plaintiff had a verdict for \$74.20, leave being reserved to the defendant to move upon his objections, which he accordingly did.

In term the learned Judge allowed the plaintiff to add a count framed upon the same facts which are alleged in the first count, but charging that when the defendant sent the transcript to the Clerk of the Essex Court he became *functus officio* as clerk, and that his subsequent conduct, including the sending of the directions how to remit the money, was in the character of agent of the plaintiff.

The defendant's rule was made absolute to enter a verdict for him, and this appeal is from that decision.

The judgment of the learned Judge is chiefly occupied with the questions under the first count. He examines a number of decisions on the subject of notice of action, and strongly inclines to the opinion that the defendant was entitled to the notice; but considers it immaterial, because his conclusion is, that the duty which the defendant is accused of neglecting, is not made out.

On the added count he holds there is no evidence of the agency, and that it cannot be assumed that the clerk acted as agent of the plaintiff; because, as he construes the Division Court Rule No. 100, which enacts that "No clerk or bailiff shall, either by himself or his partner in business, be engaged as agent for any party during the conduct of the cause in Court; and any clerk or bailiff transgressing this rule shall be subjected to the loss of his office," the agency would have been a violation of the rule, for which the Judge would have been required to dismiss the clerk from his office.

Whether or not the learned Judge was quite correct in holding there was not the relation of principal and agent, on which the count relies, I venture to think that if he had

been of a different opinion, he would not have felt bound to inflict on the defendant the penalty of dismissal without more closely considering the terms of the rule, which forbid the engaging as agent only *during the conduct of the cause in Court*.

The only reference made in the judgment to the count for money received is in the following words: "There is no evidence on the common counts."

The attention of the parties in the Court below would seem, from the notes before us, to have been so much engrossed by the contest upon the charge of negligence, that the claim for money received was perhaps less distinctly brought under the notice of the learned Judge than the facts would have warranted.

It seems to us clear that the plaintiff may maintain his verdict upon his money count; and we do not, therefore, closely examine the finding on the counts for negligence.

The defendant, by the plaintiff's direction, sent the transcript of the judgment to the Seventh Division Court of Essex, where the money was made and paid into the hands of McCrae, the clerk of that Court. It was unquestionably money received by McCrae to the plaintiff's use. And it is not unlikely that an action would still lie against McCrae for it.

By rule No. 95 of the Division Courts it is ordered that "In case the clerk shall receive money for any party, by virtue of his office, he shall without charge therefor forthwith notify the party entitled thereto, or the clerk from whom he received the transcript, that the same is received and subject to his order, and if he shall fail so to notify the party and pay over the money upon demand, he shall be subject to loss of his office." And rule No. 159 declares that "It is the duty of parties entitled to moneys collected by officers of the Court to direct how the same are to be transmitted to them. The clerk shall not be bound to transmit by post any such moneys, nor to procure and transmit post-office orders therefor, except upon the request and at the expense of the party entitled thereto. Without such direction and request

all moneys are payable to the parties at the office of the clerk without the payment of any fee whatever. In no case is the clerk to transmit moneys to the clerk of another Court without the written order of the party entitled thereto, or his authorized agent."

The directions of these rules were not observed. The defendant was notified in pursuance of rule 95 that the money was made, and he wrote to McCrae to send it to him by post office order or by cheque. McCrae had been accustomed to send moneys to the defendant by cheque of McGregor Bros., private bankers in Windsor; and what he did in this case was to pay the money to his own account into the private bank, and to obtain from the bankers their cheque for the amount upon the Molsons Bank, which cheque he remitted to the defendant by letter of 1st June, 1877. On the 2nd June the defendant acknowledged the receipt by postal card addressed to McCrae in these words: "Toronto, June 2nd, 1877. McLeish v. Richards. Received of the clerk of the Division Court, Windsor, \$70.40."

It is not pretended that there was any written order from the plaintiff for the transmission of the money from the one clerk to the other, even if such an order would have justified what was done.

The cheque was never paid, because McGregor Bros. had failed before it was presented for payment.

It may be worth noticing, though it is aside from the direct question before us, that while the law carefully guards the interest of suitors in the Division Courts by requiring security from the officers entitled to receive money on their behalf, it is here sought to make the plaintiff bear the loss occasioned by the clerk, who had given security, entrusting the money to irresponsible persons, who had given no security.

There is not even a plausible pretence for making the plaintiff sustain the loss from the failure of the private bankers. Whatever question may be possible between the defendant and McCrae, one or the other of them must pay the plaintiff his money. As I have just remarked, McCrae

might find it difficult to discharge himself as against the plaintiff. Our present inquiry relates to the defendant's liability.

He is liable, because in effect McCrae paid over the money to him.

As between McCrae and the defendant, the money passed from the control of the former to the control of the latter. The direction to remit his cheque, coupled with the course of dealing which is shewn to have been usual between them, and the acknowledgment of the receipt of the money, make the transaction equivalent to a direction given by the defendant to McCrae to pay the money to McGregor Bros., and send their cheque for it to the defendant. The plaintiff is not concerned as to the payment of the cheque. His case against the defendant is complete when he shews that McCrae parted with the money and it passed into the control or subject to the order of the defendant.

If the money had belonged to the defendant himself, he could not have recovered it against McCrae after what took place. Evidence such as we have before us would prove a plea of payment in an action by the plaintiff against McCrae. Evidence of the defendant's getting the cheque and giving the receipt would have proved payment, even if the cheque had been McCrae's own cheque. To use the language of Brett, J., in *Carmarthen R. W. Co. v. Manchester, &c., R. W. Co.*, L. R. 8 C. P. 692, "There are other modes of mercantile payments, even more common than the handing over the money; for instance, by giving a cheque and getting a receipt. The two facts constitute payment."

It is true that if the cheque had been McCrae's cheque, and it had not been paid, it might have been open to the defendant to shew that while this was *primâ facie* evidence of payment, there was in reality no payment, because the money which was to be paid remained in McCrae's pocket; but that would not be so under the facts before us. The *primâ facie* proof afforded by the cheque and receipt would be supported by the fact that the money was

paid by McCrae, and that the cheque of McGregor Bros. (which, as proved by the receipt, was accepted as payment) represented the money as actually paid.

Then the conclusion naturally follows, that if the money is proved to have been paid by McCrae to the defendant, by evidence which would support a plea of payment as between those parties, it must, on the same evidence, be held to have been received by the defendant, and if received it was undoubtedly received to the plaintiff's use. It never lost its character of "money received for the use of the plaintiff."

The question of notice of action is concluded by decisions under the Division Court Act.

In *Dale v. Cool*, 6 C. P. 544, it was decided that no notice is required in an action for money had and received.

Besides this, the want of notice is not pleaded: *Timon v. Stubbs*, 1 U. C. R. 347; *Dale v. Cool*, 4 C. P. 460; *Stephens v. Stapleton*, 40 U. C. R. 353; *McMartin v. Hurlburt*, 2 App. R. 146.

The appeal must be allowed, with costs, and the rule in the Court below discharged.

Appeal allowed.

FURNESS v. MITCHELL.

Married Woman—Tenant by the curtesy—35 Vic. c. 16, O.

Held, PATTERSON, J. A., dissenting, reversing the judgment of the County Court, that under 35 Vic. ch. 16, O., a husband was not deprived of an estate by the curtesy in any lands of his wife which she had not disposed of *inter vivos* or by will.

This was an appeal from the judgment of the Judge of the County Court of the County of Norfolk, in a partition suit of certain real estate of one Mary Mitchell, deceased. The learned Judge held that Erasmus Wilson, who was married to Mary Wilson prior to the 4th day of May, 1859, was not entitled to an estate by the curtesy in the lands in question, which she acquired in September, 1874.

From this judgment the plaintiff, to whom the husband had conveyed his interest, appealed.

The appeal was argued on the 4th September, 1878. (a)

Bethune, Q. C., for the appellant. Sections 1 and 8 of 35 Vic. ch. 16, O., shew that the Legislature did not intend to deprive a husband of his right to curtesy in the lands of his wife, where they were married before the passing of that Act. That such was their intention is clear from the use of the words "after the passing of this Act." As a matter of construction, it is a well understood principle that acquired rights are not to be presumed to be taken away. The case of *Austin v. Dingman*, 33 U. C. R. 190, shews that section 1 is not retrospective. For many purposes this right to curtesy commences during the life of the wife. Upon the birth of issue, it becomes a tenancy *initiate*; and even if the Act was intended to apply to marriages before the passing of the Act, it was only intended to deal with the tenancy *initiate*, and it is perfectly consistent with the language employed to hold that the husband still has a tenancy by the curtesy, where the wife has not disposed of the estate *inter vivos*, or by will. He referred to *Bank of*

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Montreal v. Scott, 17 C. P. 358; *Bright* on H. & W. 124; *Fraser v. Hilliard*, 16 Gr. 101; *Appleton v. Rowley*, L. R. 8 Eq. 139.

C. E. Barber and *H. J. Scott* for the respondents. This matter is not appealable, as it is not a "final order, decree or judgment," within the meaning of sec. 6 of R. S. O. ch. 101. *Adams v. Loomis*, 24 Gr. 247 shews that section 1 of 35 Vic. ch. 16, applies to cases where lands have been acquired after the passing of that Act, although the marriage took place before. The language used in the section plainly shews that tenancy by the curtesy is taken away. This was not a tenancy by the curtesy initiate, it was merely an expectancy, and the rule against construing Statutes retrospectively does apply. The contention that it merely provides for the wife disposing of the estate during her life is clearly untenable. They cited *Merrick v. Sherwood*, 22 C. P. 467; *Johnstone v. White*, 40 U. C. R. 309; *Harrison v. Douglas*, 41 U. C. R. 410; *Moore v. Webster*, L. R. 3 Eq. 267; *Ball v. Ball*, 1 P. W. 108; *Wagner v. Jefferson*, 37 U. C. R. 558; *Dwarris* on Statutes, 101.

January 14, 1879 (a). MOSS, C. J. A.—The point for decision is, whether the appellant is entitled to an estate for the life of Erasmus Wilson in certain lands, of which Mary Wilson died seized in fee on the 8th of January, 1876. Erasmus and Mary Wilson were married before the 4th of May, 1859, and she acquired the premises in question by purchase in the month of September, 1874. If Erasmus Wilson had an estate as tenant by the curtesy, the appellant is entitled to judgment.

If the case depended upon the provisions of the Married Woman's Act of 1859, it would be free from doubt, for the Legislature sedulously protected the husband's estate by the curtesy. The 4th section provides that no conveyance or other act of a wife in respect of her real estate shall deprive her husband of any estate he may become entitled to

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as tenant of the curtesy. The 16th section, while conferring upon a married woman a qualified power to devise her realty, expressly protects the right of the husband from being affected by her disposition. As Mr. Leith has pointed out in his work on Real Property Statutes, 284, the necessity for this provision is not quite obvious, because without some absolute extinguishment of the husband's right by the statute, it could hardly be supposed that she could, by her devise, deprive him of his estate by the curtesy, any more than he could deprive her of her dower. The clauses were probably inserted to close the door against every doubt; but, however that may be, their unmistakable effect was to preserve the marital right unimpaired.

The law remained unchanged until the passage of the Married Woman's Property Act, 1872, the first section of which it is necessary to examine. Its language so far as is material to our enquiry is, that "after the passing of this Act, the real estate of any married woman, which is owned by her at the time of her marriage, or acquired in any manner during her coverture, and the rents, issues, and profits thereof, shall * * be held and enjoyed by her for her separate use, free from any estate or claim of her husband during her lifetime, or as tenant by the curtesy, and her receipts alone shall be a discharge for any rents, issues and profits; and any married woman shall be liable on any contract made by her respecting her real estate, as if she were a *feme sole*." Every member of the bar is familiar with the train of decisions by which it was finally settled that the Act of 1859 did not give the married woman the *jus disponendi*, and that her position was essentially different from that founded upon a settlement to her separate use in the sense recognized in Courts of Equity. In the elaborate discussion which the terms of that statute received from the present Chancellor in *Royal Canadian Bank v. Mitchell*, 14 Gr. 412, attention was directed to the absence of language indicating either expressly or by necessary implication that her estate was to be held and enjoyed *to her separate use*.

These decisions may account for the introduction of the Act of 1872, whereby there is explicitly attached to such property that quality of separate estate which had been denied to it by the construction placed upon the Act of 1859. But it soon appeared that the language adopted by the legislature presented its own peculiar difficulties and embarrassments.

Almost immediately there arose questions as to the extent to which it was designed to be retroactive, and the decisions by Courts of equal authority were not entirely in unison. It has been argued before us that the first section is limited to the case of women married after the passing of the Act, it being suggested that there should be a transposition of the language, and that it should be construed as if it were worded, "The real estate of any woman married after the passing of this Act." In support of this view reference is made to the expression of opinion by Sir Wm. Richards, then Chief Justice of the Court of Queen's Bench, in deciding the case of *Dingman v. Austin*, 33 U. C. R. 190. I think there can be no doubt that that case was well decided, and that the learned Chief Justice uses language which may seem to indicate that the inclination of his opinion was to restrict the application of the first section to the case of marriages after the Act, but this generality of expression was not essential to the adjudication, and it is only proper to read the observations of the Judge with reference to the special circumstances. There the marriage had taken place in 1851, and the husband had entered into possession in 1852. His rights, therefore, had been preserved by the Act of 1859, and the only argument open to his opponent, who claimed under a lease made by the wife, was that the marital right to the possession during the joint lives was extinguished by the Act of 1872.

This argument was not allowed to prevail, but it is obvious that it would have been equally met by limiting the application of the section to the case of lands acquired after the Act. This is the construction of the enactment which has since received the sanction of the Courts, and which appears to be founded upon sound principles.

It is very clearly explained by Proudfoot, V. C., in *Adams v. Loomis*, 24 Gr. 247. The construction now contended for involves a straining of the language of the Legislature, which is wholly unnecessary to guard the husband against any injustice. He cannot fairly complain, although he was married before the Act, if its effect is to leave him any estate or interest to which he was then entitled. Mr. Bethune, indeed, argued that marriage is the foundation of the husband's rights, and that when this marriage took place the husband acquired a right, or some kind of potential interest, not only in the estate of which his wife was then the owner, but in any to which she might become subsequently entitled. I think it is very clear that this position cannot be sustained. It cannot be supposed that the Legislature intended to preserve a possible advantage of so shadowy a character, nor can the husband complain that he is a victim of retrospective legislation if he is permitted to retain any estate or interest which existed before the Act.

The question therefore is, whether the effect of the Act is to leave the husband tenant by the curtesy, where the wife dies intestate. Upon the whole I am of opinion that such is its proper construction. It does no violence, I think, either to the language of the enactment or to its apparent object, and it is consonant to the canon of interpretation, which saves a man from being deprived of his estate by doubtful inference.

Upon this construction the land will not be one whit the less held and enjoyed *by her* for her separate estate, free from any estate of her husband during her lifetime, or as tenant by the curtesy. By according this estate to the husband, in the event of her intestacy, no restraint is imposed upon her power of disposition or alienation. If she chooses to dispose of it by an act *inter vivos*, she cuts off her husband's prospect of holding this estate. If the mode of enjoyment she prefers is to leave it by will, she can thus defeat his hopes.

In short, his interest can only arise when her holding

has terminated, and she has not chosen to deal with it in any manner. She has thus evinced her intention that it should descend according to the usual course of inheritance, and in the Act respecting the descent of real property, the right of the husband, as tenant by the curtesy, is expressly recognized, (R. S. O. ch. 105, sec. 40). The reasoning of Malins, V. C., in *Appleton v. Rowley*, L. R. 8 Eq., at p. 142, seems to be very apposite. Speaking of the devise to the wife in that case, he remarked that it was to her in fee simple with a direction that the property should be held for her separate use, and that its effect was to give her power to alienate the property without the concurrence of her husband. He then proceeded to use the following language: "If she had conveyed it by deed, or devised it by will, the trustees would have been bound to convey the legal estate to any person taking under such deed or will. She had the whole equitable estate in fee simple, and it being clear that curtesy attaches wherever the wife is entitled to a fee, why should not the husband have curtesy in this property? The separate use clause is for the protection of the wife, and would have entitled her as against her husband to make an alienation. She has died without making any disposition of the property, and was seized of the equitable estate in possession. * * It would be contrary to every principle that a clause introduced for the benefit and protection of the wife should prevent the husband from having his right to curtesy."

This case was, as the learned Judge has pointed out, in conflict with the decision of Vice-Chancellor Stuart, in *Moore v. Webster*, L. R. 3 Eq. 267, but the question is now set at rest by the judgment in *Cooper v. Macdonald*, 38 L. T. N. S. 191, in which the Master of the Rolls, after an elaborate review of the authorities, unhesitatingly maintained the correctness of the view adopted by Sir Richard Malins. He pointed out the chief incidents of separate estate, and shewed that it enabled her to make a pure and clear disposition of it, and that in that way it was wholly independent of the husband. He then proceeded,

in language so clear and forcible, and as it seems to me so suggestive of the course of reasoning which we ought to follow, that I cannot forbear from quoting some passages: "But that is no reason for carrying it a step further. The separate use, if I may say so, is exhausted when the wife has died without making a disposition. She enjoyed the income during her life, and she has not thought fit to exercise that which was an incident of her separate estate, the right of disposing of her property. Why should equity interfere further with the devolution of the estate? Why should it prefer the eldest son to the husband, who had a right—at all events during her life—of succeeding, so to speak, to the estate which had become vacant by the death of the wife? I can see no reason on principle, and therefore it appears to me, if you decide on principle only, you will come to this conclusion: that where a wife, either by deed *inter vivos* or by will, disposes of the fee simple settled to her separate use, that disposition takes effect free from any claim of the husband or of the oldest son, or other heir at law; but that where she dies without making any such disposition, the rights of the husband and the rights of the heir are equally unaffected, and equity ought to follow the law."

We are not, as it seems to me, confronted in this case with the serious difficulties in the way of placing a satisfactory construction upon this statute that may be raised by considering the Act of the following session respecting the conveyance of real estate by married women, 36 Vic. ch. 18, O. That Act is certainly very wide and comprehensive in its terms. It enables a married woman, of full age, to convey by deed, and to appoint an attorney by deed as fully and effectually as she could do if she were a *feme sole*, but it adds the proviso that "unless hereinafter otherwise provided, no such conveyance * * shall be valid or effectual, unless the husband is a party to, and executes the deed by which the same shall be effected." It seems difficult to suppose that the Legislature meant in this indirect mode to destroy the large powers of dealing with their real estate,

which had been conferred upon married women by the Act of 1872. To require the concurrence of the husband, and the execution of the deed by him in order that the estate may be conveyed, would seem to be equivalent to neutralizing, or at least largely impairing, the provision that she shall be liable on any contract made by her respecting her real estate as if she were a *feme sole*. How, it may well be asked, can the husband be compelled to join in a conveyance when he was not a party to the contract? And if he can be compelled, what is the object of requiring his concurrence? It may be found that the only solution is to hold that the Act of 1873 only applies to cases where the marriage took place and the property was acquired before the 2nd of March, 1872, and that where the property was acquired subsequently, a conveyance by the wife alone will suffice. That, however, is a mode of interpreting the statute which could only be adopted after great consideration, for no such restriction of its operation is to be gathered from its own language. But it will be time enough to grapple with these difficulties, when the question directly arises. It is enough at present to remark that it seems impossible to draw any inference that the Legislature intended to abolish the estate by the curtesy *in toto*, from the circumstance that in the next session it rendered his concurrence in a deed essential to its validity.

Nor do I think that much importance is to be attached to the circumstance that in the Act as finally revised (R. S. O. ch. 125, sec. 4) there is added the proviso that nothing therein contained shall prejudice the right of the husband as tenant by the curtesy in any real estate which the wife has not disposed of *inter vivos* or by will. This clause was introduced, not as the learned Judge of the County Court seems to suppose, by the Commissioners, but by the Legislature in 40 Vict. c. 7, and it is true that that is not a declaratory Act. But we are not bound to infer from it that in the opinion of the Legislature the Act of 1872 did not admit of that construction. Having regard to the general nature and character of the schedule

to the Act of 40 Vict., it is fully as reasonable to attribute this addition to the desire that the point should be placed beyond controversy.

I think that the appeal should be allowed, with costs, and that such costs should be charged upon the respondent's interest in the property.

BURTON, J. A.—Although the question submitted for our decision has ceased to be of any general importance in consequence of the words added by the Legislature to sec. 1 of 35 Vic. ch. 16, as revised and consolidated, it is one of considerable difficulty—this difficulty, speaking for myself alone, having arisen from the wording of the 36 Vic. ch. 18, sec. 3, O., which, if construed in its literal sense, would make *any* conveyance by a married woman invalid unless the husband were a party to and executed the deed, a construction which must necessarily render sec. 1 of the previous Act nugatory, as specific performance of a contract made by the wife for the sale of her separate estate could not be enforced by a Court of equity, which would be powerless to compel the execution of the deed by the husband.

The Act of 1872, 35 Vic. ch. 16, was presumably passed in consequence of the construction placed by the Courts upon the Married Woman's Act of 1859, determining that the separate estate referred to in that Act was a mere creature of the statute, altogether distinguishable from "separate estate" in the sense in which Courts of Equity have been in the habit of using that expression, one of the reasons for the decision referred to being that the estate of the husband as tenant by the curtesy was expressly retained, and another that the *jus disponendi*, which was said to be the very foundation of the English decisions as to separate estate, was wanting.

These doubts were, I assume, intended to be set at rest by the Act of 1872, which declares that the real estate owned or acquired by a married woman after its passage shall be held and enjoyed *for her separate use*, free from

any estate of the husband *during her life time* or as *tenant by the curtesy*, and that any married woman shall be liable on any contracts made by her respecting her real estate as if she were a *feme sole*. Language more comprehensive to meet and remove the difficulties suggested in the decisions to which I have referred, to enable the wife to hold real estate for her separate use and to make contracts respecting it, it would be difficult to conceive. Whatever may be said about the intention of the Legislature in the previous legislation, it can scarcely be said of it as regards the Act of 1872, "*quod voluit non dixit*."

It was always considered to be clear that when land was settled to the separate use of a married woman for life, she had the same power over her life interest therein as she would have as a *feme sole*, and a contract to sell or mortgage her interest was always specifically enforced against her; but as regards the fee in such property it was for a long time held that a married woman could not dispose of it by will without an express power of appointment, or convey it by deed *inter vivos* so as to disinherit or bind her heir otherwise than by a conveyance executed in conformity with the Fines and Recoveries Act, similar somewhat in its provisions to our own Statutes respecting the conveyance of real estate by married women.

The result, however, of the more recent decisions, as I understand them, is, that a married woman having real property settled to her separate use in fee, and not being restrained from alienation, has, as incident to her separate estate and without any express power, a complete right of alienation by instrument *inter vivos*, without the concurrence of her husband or a separate examination under the Act.

In the cases in which those decisions have been given, the legal estate having been vested in trustees, the conveyance by the married woman was of the equitable fee only, but the purchaser had a right under such a conveyance to call upon the trustees to transfer the legal estate.

In the leading case of *Taylor v. Meads*, 11 Jur. N. S. 166, it was held that in cases where real estate is held by trustees in fee upon trust for the separate use of a married woman and her heirs, she has the same power of disposition by deed or will over the equitable fee as she would have if she were a *feme sole*; and in the course of his judgment in that case, Lord Chancellor Westbury says: "There is no difficulty as to the principle. When the Courts of Equity established the doctrine of the separate use of a married woman, and applied it to both real and personal estate, it became necessary to give the married woman, with respect to such separate property, an independent personal status, and to make her in equity a *feme sole*. It is of the essence of the separate use that the married woman shall be independent of and free from the control and interference of the husband. With respect to separate property, the *feme covert* is, by the form of trust, released and freed from the fetters and disability of coverture, and invested with the rights and powers of a person who is *sui juris*. To every estate and interest held by a person who is *sui juris* the common law attaches a right of alienation, and accordingly the right of a *feme covert* to dispose of her separate estate was recognized and admitted from the beginning, until Lord Thurlow devised the clause against anticipation. But it would be contrary to the whole principle of the doctrine of separate use to require the consent or the concurrence of the husband, in the act or instrument by which the wife's separate estate is dealt with or disposed of—that would be to make her subject to his control and interference. The whole matter lies between her and her trustees, and the *true theory of her alienation is, that any instrument, be it deed or writing, when signed by her, operates as a direction to the trustees to convey or hold the estate according to the new trust, which is created by such direction. This is sufficient to convey the feme covert's equitable interest. When the trust thus created is clothed by the trustees with the legal estate, the alienation is complete both at law and in equity.*"

He then points out that as regards an ordinary equitable estate belonging to a *feme covert*—for example, when lands are given to trustees in fee, upon trust for a married woman and her heirs—equity follows the law, and requires that equitable estates should be dealt with *inter vivos* in the same manner as legal estates, and under the formalities required in reference to them.

Our statute dispenses with the necessity of trustees, but the wife's estate being by the Act fully settled to her separate use, there being no restriction under it upon her power of alienation, she must be held to have acquired as incident to that separate estate, and without any express power, a right of alienation, by instrument *inter vivos*, or by will. The words therefore as to her liability upon contracts relating to it appears to have been introduced *ex abundanti cautela*.

That must, I humbly conceive, have been the construction we should have been compelled to place upon this statute prior to the passing of the 36 Vic. ch. 18.

In order to arrive at a proper construction of this later statute, it is necessary to consider how the law stood at the time of its passage.

The law then in force, ch. 85 of the Consol. Stats., as amended by 34 Vic. ch. 24, required the married woman seized of real estate, in order to make an effectual conveyance of it, to do so by deed executed by her jointly with her husband, and that she should execute it in the presence of a judge or other named official, who should examine her apart from her husband, respecting her free and voluntary consent so to convey, and who should endorse a certificate upon the deed.

Subsequently to the passage of those Acts, the 35 Vic. ch. 16, became law, making the real estate of married women acquired after its passage "separate estate" in the largest sense of that term. To an estate so held the law attaches a right of alienation without the consent or concurrence of the husband.

It is a canon of construction that all words, if not ex-

press or precise, are to be restricted to the fitness of the subject matter—that is, they must be understood as used in reference to the subject matter in the mind of the Legislature, and to it only. As Sir Peter Maxwell observes in his work, “General words and phrases, however wide in the abstract, are more or less elastic and admit of restriction or expansion to suit the subject matter. While expressing truly enough all that the Legislature intended, they frequently express more in their literal meaning and natural force, and it is necessary to give them the meaning which best suits the scope and object of the statute without extending to ground foreign to the intention.” *Maxwell on Statutes*, p. 54.

Assume for the moment that the Legislature, instead of using language which, although to my mind clear and unambiguous, may not be so regarded by others, had said expressly that after the passing of that Act all real estate held by married women should be deemed to be estate settled to their separate use, and that they should have the power of dealing with it as absolutely and as freely as if they were unmarried, it could scarcely be contended that they proposed, by a mere side wind, to destroy the effect of that enactment and repeal the principle embodied in it, by requiring the concurrence of the husband to give validity to the wife’s conveyance, especially where we find there is a large class of married women not coming within the 35 Vic. ch. 16, O., who laboured under the disability of being unable to convey unless with the formality of an examination. Must we not rather assume that the 36 Vic. ch. 18, O., was passed to relieve this class of people from the necessity of the examination, and to simplify the mode of conveying their estate?

It must not be overlooked that ch. 85 of the Con Stat., which was passed on the same day as the original Married Woman’s Act, commences with a declaration that the requirements theretofore necessary to give validity to the conveyance of a married woman, should continue to be necessary notwithstanding any thing contained in any Act passed during the same session, and this circumstance

influenced the decision in *Royal Canadian Bank v. Mitchell*, 14 Gr. 412,

I agree in the general result view arrived at by Vice-Chancellor Proudfoot, in *Boustead v. Whitmore*, 22 Gr. 228, in construing 36 Vic., whilst differing from him as to the construction placed by him upon sec. 11, which, in my opinion, is merely intended to declare that where the married woman is invested, not with an estate, but a power to sell, appoint, mortgage, encumber or lease an estate, or reconvey the mortgaged premises, such a power for instance as is given by such statutes as ch. 107 of the Revised Statutes, or by contract or settlement, the power so conferred shall not be impaired or affected by that Act, but she may still exercise every such power as fully and effectually as she could before, unless by a conveyance under the Act she has suspended or extinguished the power.

By adopting this construction, we give a sensible meaning to both Acts, whilst the other would in effect repeal or render nugatory the legislation of the previous session extending the rights of married women. I come, then, to the conclusion that the Act of 1873 is a mere amendment of the Consol. Stat. of U. C. ch. 85, and the 34th Vic., and does not and was not intended to affect the Act we are considering.

But whilst full effect should be given to the Act of 1872, for the purpose of securing to married women the absolute enjoyment of their separate property, and to remedy an enormous wrong imposed upon them under the much vaunted doctrines of the Common Law, we ought not unnecessarily to deprive the husband of his estate by the curtesy, except so far as is necessary to give full effect to the Act.

The wife, according to the view which I take of the Act of 1872, can contract to sell or dispose of her real estate, and execute all such conveyances as may be requisite to carry such contracts into effect, and she may dispose of it by will, and in either case her disposition will carry the whole estate, or whatever she may purport to convey, and deprive the husband of the estate by the curtesy; but I can see no good reason why a construction should be placed

upon the words which they do not necessarily bear, in order to deprive him of the estate incident to the wife's seizin in cases where she makes no disposition of the property. I regard the words added to sec. 1 by the Legislature, as nothing more than what the law would have declared without their introduction. .

I may perhaps add that the learned Judge of the County Court, in his very able judgment, is mistaken in the criticisms he indulges in as to the commissioners for the consolidation of the statutes having exceeded their powers of "revision, classification, and consolidation." The additions he refers to were made by the Legislature, one of them adopting a decision or dictum of Richards, C. J., in reference to the Act not applying to marriages prior to the Act, the other adopting in future the rule which, according to my judgment, has always as to property affected by the Act of 1872 prevailed, that unless the wife disposed of such property during life, the husband should not be deprived of his common law estate as tenant by the curtesy.

I am of opinion, therefore, that Erasmus Mitchell was entitled to an estate for his life as tenant by the curtesy, and that the order should be varied accordingly, and this appeal allowed, with costs.

PATTERSON, J. A.—I understand the decision in *Dingman v. Austin*, 33 U. C. R. 190, in the same way as the learned Judge of the County Court. It is, I think, perfectly clear that the first section of the Act of 1872 (35 Vic. ch. 16, O.) applied to real property acquired after it came into force, notwithstanding that the woman was married long before that date; and nothing at variance with this was decided by *Dingman v. Austin*.

This case therefore presents the distinct question, does section 1 of the Act of 1872 deprive the husband of curtesy in lands of which the wife dies seized, all things existing which are essential to the estate at common law?

The section substituted by 40 Vic. ch. 7, expressly saved the curtesy in all lands not disposed of by the wife *inter*

vivos or by will. But this amendment was made after the death of Mary Mitchell, whose husband's estate is now in question; and it is confined to the real estate of women married after 2nd March, 1872. This express limitation, which excludes cases like the one before us, makes it impossible to give the amendment a retrospective effect. If proper to refer to it at all, it would tend to shew that the Legislature understood the first Act as destroying the curtesy; because, after re-enacting the operative portions in words nearly the same as those originally used, it was thought necessary to add the saving proviso, "But nothing herein contained shall prejudice the right of the husband as tenant by the curtesy in any real estate of the wife which she has not disposed of *inter vivos*, or by will."

The main question is probably raised in this case for the first time in a direct form for judicial decision; but it has been noticed by Mr. Justice Gwynne, in *Merrick v. Sherwood*, 22 C. P. 467, and by Vice-Chancellor Proudfoot in *Boustead v. Whitmore*, 22 Gr. 226, both of those learned Judges being of opinion that the Act of 1872 deprived the husband of all interest in the lands of his wife.

Under the Act of 1859 (C. S. U. C. ch. 73 sec. 2) Mrs. Mitchell was entitled to have, hold and enjoy the land free from the debts and obligations of her husband contracted after 4th May, 1859, and from his control or disposition without her consent in as full and ample a manner as if she were sole and unmarried; but (sec. 4) no conveyance or other act of hers could have deprived her husband of his estate by the curtesy; while, on the other hand, (sec. 13) his interest could not be made subject to his debts during her life time.

As I read the Act of 1872, it extended the right of property thus given to the wife by cutting off the interest which, under the Act of 1859, remained in the husband. Whether it did more than that is, strictly speaking, beyond the scope of our present inquiry; but as it seems to be agreed on all hands that the object of the Act was to do what its title imports, and "extend the rights of property

of married women," and as it is argued that this extension is made in other directions, and not by annulling the husband's remaining marital right, the range of discussion is widened.

It is no part of my argument that the effect of the first section, in extending the rights of property, is exhausted by the destruction of the husband's curtesy. I think it has that effect at all events, and it will have it none the less by reason of its operation extending further. At the same time I am unable to see that in any other particular it advances the rights of the married woman beyond the point attained by the Act of 1859.

The declaration is, that she shall hold and enjoy her real estate for her separate use, free from any estate or claim of her husband during her life time, or as tenant by the curtesy, and her receipts alone shall be a discharge for any rents, issues, and profits; and any married woman shall be liable on any contract made by her respecting her real estate, as if she were a *feme sole*.

It cannot be denied that this contains expressions which, in any settlement, would be conclusive in favour of the limitation to the separate use of the wife, even if the words "for her separate use" were omitted, and even without the words "and from his debts and obligations," which are not in this Act, but have been supplied in the section substituted in 1877.

In *Lewin on Trusts* (4th Ed. p. 488) there is an enumeration of expressions which have in different wills or settlements been held sufficient to defeat the marital claims, and amongst others the phrases: "that she may receive and enjoy the profits," "to receive the rents from the tenants while she lives, whether married or single," with a direction that no sale or mortgage should be made during her life; "not subject to his control," and "her receipt to be a sufficient discharge."

But the Act of 1859 was quite as emphatic in asserting the separate use as that of 1872, when it empowered her to have, hold, and enjoy the land free from the debts and

obligations of the husband, and from his control or disposition without her consent, in as full and ample a manner as if she were sole and unmarried.

The estate given by the Act of 1859 was held not to be separate estate of the character recognized by Courts of equity, because there was not the *jus disponendi*; and it is said that the Act of 1872, expressly declaring it to be separate estate, in this respect extended the rights of the married women.

I had occasion to refer to the decisions on this subject in *Lawson v. Laidlaw*, 3 App. R. 77, and I do not now propose to dwell upon them.

It was undoubtedly held that while in equity a woman could by her general engagements charge her separate estate, which was entirely the creature of equity, she could only do so when she had absolute control of the property; and it was held that the Act did not confer upon her that absolute control, because it left her husband's curtesy beyond her power, and it did not enable her to convey apart from her husband. The consequence was, that her general engagement was held not to bind her property.

I do not know that in deciding the case of the *Royal Canadian Bank v. Mitchell*, 14 Gr. 412, the present Chancellor laid much, if any, stress on the circumstance that the husband had a right to curtesy, and I do not suppose it is now contended that there may not be curtesy in separate estate: *Morgan v. Morgan*, 5 Madd. 408; *Appleton v. Rowley*, L. R. 8 Eq. 139.

The Act of 1859 called the property enjoyed under its provisions "separate property." It is so designated in sections 14, 16, 17, 18, and 19. The decision in *Royal Canadian Bank v. Mitchell* did not proceed upon the ground that the property was not separate property—the very terms of the statute would have forbidden that—but upon the ground that those incidents of separate property which enabled Courts of equity to give the relief sought in that action were wanting.

But if the point were made out that what the Act of

1872 calls separate property with incidents which it specifies, has qualities different from what the Act of 1859 called separate property with incidents specified in language quite as perspicuous, how far does that advance us? I agree that there is a difference, but I find the difference to consist in the abolition of curtesy.

I can fully appreciate the argument which shews that it may not have been necessary for the full enjoyment by the wife of her separate estate, to do away with the husband's curtesy in such land as she does not dispose of *inter vivos* or by will; and I can understand how the force of considerations of this kind may have led to the amendment of 1877; but I cannot find the qualification in the Act of 1872.

I am told that the difference made by the Act of 1872, or a difference, is, that there is power given to convey without the concurrence of the husband, and power to devise; and that while such a disposition will defeat the husband's claims, these claims remain good if neither deed or will is made.

I confess myself unable to find this in the statute, or to follow this line of construction, without proceeding on principles which, to my apprehension, are unsound.

Where do we find the power to convey? No doubt one of the incidents of separate estate, as dealt with by Courts of Equity, was that the owner was regarded as a *feme sole*, with full power, as between herself and her husband, to alien or charge her property. But this touched her equitable estate only; she merely appointed the trusts on which the property was to be held. The legal estate had to be conveyed according to the rules of law, whether it was vested in trustees or in the married woman herself. Her power is thus stated in *MacQueen* on H. & W., p. 296: "If a married woman has the fee simple of real property to her separate use, she may, without her husband's concurrence, convey the equitable or beneficial interest by deed, executed by herself alone; for as Chief Baron Reynolds said in *Rea v. Williams*, (3 Sugd. V. & P. App. 62) "every

one who has an estate has two rights in him, a legal and an equitable interest." In *Ex parte Ann Shirley*, 5 Bing. N. C., 226, a fiat was made by the Court of Common Pleas under the Fines and Recoveries Act (3 & 4 Wm. IV. ch. 74, secs. 77, 91), giving the sanction of the Court to a conveyance of copyhold property by a married woman without the concurrence of her husband, who was living abroad with another woman. The land had been devised to the applicant to her sole and separate use, but this circumstance did not enable her to convey apart from her husband.

When the Act of 1872 was passed the law was in full force (C. S. U. C. ch. 85) which required the concurrence of the husband and the examination of the wife as essentials to the validity of a deed of her lands. The learned Judge who decided *Royal Canadian Bank v. Mitchell*, 14 Gr. 412, did not dispute or lose sight of the proposition, which is stated by Lord Westbury in *Taylor v. Meads* to be established by the great preponderance of authority, viz., that a *feme covert*, when not restrained from alienation, has in equity the same *jus disponendi* over her separate estate by deed or will as she would have if free from the disability of coverture. But dealing with a right created by Statute, not one resulting from the doctrines of equity, his Lordship held it to be governed by the Statute law.

Now, conceding to the words "separate use" the fullest effect I can anywhere find attributed to them as touching the power to convey, and that is the power to deal with the equitable and not with the legal estate; and without disputing that the recognition of separate property at law would have carried with it the power to convey by deed without the husband's assent or concurrence; I perceive no sufficient ground for treating the law as repealed which annexed certain requisites, whether formalities or effective safeguards, to the right to convey by deed. I do not consider myself at liberty to say that because the reason which I may suppose prompted the enactment has, in my opinion, ceased to prevail, therefore the law is repealed.

The maxim *cessante ratione legis cessat ipsa lex* does not usually apply to statute law. Besides this, it is incorrect to say that the reason had ceased; because even if the cesser of the husband's interest had made it illogical to retain him as a necessary party to the deed, the possibility of coercion, which the law aimed at guarding against by the examination, continued to exist.

Then came the Act of 1873 (36 Vic. ch. 18), which dispensed with the examination, but retained the necessity for the concurrence of the husband, with a provision for dispensing with it also similar to that which was acted on in *Ex parte Shirley*, 5 Bing. N. C. 226, to which I have referred.

The terms of this Act are perfectly clear, and full, and unambiguous: "Every married woman, being of the full age of twenty-one years, may by deed convey her real estate, and convey, release, surrender, disclaim, or extinguish any interest therein, and may also by deed release or extinguish any power which may be vested in, or limited, or reserved to her in regard to real estate * * save and except that, unless hereinafter otherwise provided, no such conveyance, release, surrender, disclaimer, or extinguishment shall be valid or effectual unless the husband is a party to and executes the deed by which the same shall be effected."

In *Lawson v. Laidlaw*, 3 App. R. 77, I expressed the opinion that while the effect of the statute of 1872 is to recognise at law estates and interests which were once recognised only in equity, and to enable a married woman to bind herself at law by a contract which could in former times have existed only in the view of a Court of equity, it made no change in the formal requisites of a legal contract or of a legal conveyance. A contract or a charge which were sufficient in equity are still sufficient there, but the new power to make a legal contract or conveyance will not be effectually exercised by a married woman unless in the way which would be necessary if she were single.

The separate estate held under the Act of 1872, is a legal

estate. It is an interest in real estate, and it is real estate, within the meaning of those words as used in the Act of 1873, respecting conveyances. To attempt to except it from the operation of the plain terms of that Act by a process of reasoning founded on the incidents of separate estate in equity, when the statute itself makes no such exception, seems to me simply to ignore a legislative mandate expressed in terms as free from ambiguity as any which our language affords. I cannot consent to read "every married woman" as meaning only married women of a particular class, or married before a particular date. And when the Act defines "real estate as extending to any interest therein, whether legal or equitable," I cannot say that this does not include separate estate. Why the husband's concurrence should be required when his interest has ceased, or why the examination is no longer made necessary, though coercion may still be possible, are questions which do not concern me at present. My duty is to declare the law as I find it laid down on the face of the statute.

My meaning may perhaps be better expressed by adopting language used by Lord Coleridge in the recent case of *Coxhead v. Mullis*, L. R. 3 C. P. D. at p. 442, when he said, "The tendency of my own mind, right or wrong, always is to suppose that Parliament meant what Parliament has clearly said, and not to limit plain words in an Act of Parliament by considerations of policy, if it be policy, as to which minds may differ, and as to which opinions may vary. We may thus make that which is a plain and simple enactment,—I will not say inoperative—but doubtful or obscure, if considerations are to be introduced into the construction of it, when it is entirely uncertain whether they were present to the minds of the Legislature when the enactment was made * * and I cannot accede to the argument of the plaintiff's counsel without putting a word into the statute * * which Parliament has deliberately left out, and which I am not to assume that Parliament has carelessly left out, meaning that the Judge should supply it."

I observe that in *Boustead v. Whitmore*, 22 Gr. 226, Proudfoot, V. C., referring to the interpretation which the Act gives of *real estate*, as including any estate, right, title, or interest, whether legal or equitable, observes that this would seem wide enough to comprehend a separate estate under either of the Acts of 1859 or 1872; but he holds that property held under the latter Act is excepted from the Act of 1873, by the effect of the eleventh section, which provides that the powers of conveying given by that Act shall not impair or affect any powers which, independently of that Act, might (either by statute, contract or settlement) be vested in or limited or reserved to her, so as to prevent her from executing such powers in any case, except so far as by any conveyance made under that Act she may be prevented from so doing in consequence of such powers having been suspended or extinguished by such conveyance—a provision evidently taken from section 78 of the Fines and Recoveries Act, 3 & 4 Wm. IV. ch. 74, with the addition of the words, “either by statute, contract or settlement.” And the learned Vice-Chancellor considers that the word “statute” refers to the Act of 1872, 35 Vic. ch. 16, and gives to the clause the effect of exempting from the operation of the Act of 1873 all estates of married women over which powers had been given to them by the Act of 1872.

I cannot concur in this view. I do not find any powers conferred by the Act of 1872. I find certain rights of property given, and whatever power is incident to one's dominion over one's own property follows as a consequence. But that is not what sec. 11 seems to me to deal with. I take it to refer to powers in the technical sense of the term, as appears not only from the use of the word itself, but from the whole wording of the clause. And I think the statutory powers referred to, which are of the same class as those created by contract or settlement, are powers such as those given to executors, administrators and trustees by 29 Vic. ch. 20, sec. 13, 32 Vic. ch. 10, and 36 Vic. ch. 20, secs. 33, 34, 35; and which may now be found in the Rev. Stats. ch. 106 and 107.

While, therefore, I agree with the learned Vice-Chancellor in his reading of the Act of 1872, as divesting the husband of all interest in his wife's land, and in his understanding of the operative section of the Act of 1873 respecting conveyances, I cannot find in sec. 11 any exemption of separate estate from the general law which the Act established.

Neither can I perceive any satisfactory reason for giving to the law under these Acts a different application from that which obtained when *Royal Canadian Bank v. Mitchell*, 14 Gr. 412, was decided.

Returning to the clause itself, I should be very willing to hold that its effect was the same as that of the substituted clause of 1877 if the language seemed fairly to warrant that construction, but in whatever point of view I regard it the same conclusion seems to be indicated.

The argument that the curtesy, which is only consummate after the death of the wife, is not pointed at by the language which refers to her holding and enjoying the land, is met by the very frame of the sentence—"free from any estate or claim by her husband during her life time *or* as tenant by the curtesy"—treating the curtesy as something not covered by her life time.

Then are we to give any meaning to the words, "or as tenant by the curtesy," or must we do as was suggested by Mr. Justice Gwynne in *Blakeley v. Hall*, 21 C. P. 138, with regard to another statute, and reject them as meaningless? We must give effect to them if possible, and I cannot see that they have any force unless they mean that the husband is to have no estate as tenant by the curtesy in the land which is declared to be the separate property of the wife. If they do not mean that, the sentence would, as I understand the language, express as much without those words as with them.

I am quite aware that the intention to do away with the marital right might have been more happily and more directly expressed. I concede that to say that a life-estate shall be held and enjoyed free from any estate or

claim of the remainder man, would be an awkward way of saying that there should be no estate in remainder; and that we employ language very much of this character when we say that a married woman shall hold and enjoy her land free from any estate or claim of her husband as tenant by the curtesy. But we have, as it strikes me, to choose between giving a meaning to the words as we find them, and silencing them altogether.

And if we are asked to judge them with great strictness, and reject them because they do not express with technical precision the meaning they seem to have been intended to convey, we must inquire whether it is after all technically inaccurate to speak of the estate by the curtesy as existing during the lifetime of the wife, or to express the intention to do away with it by enacting that she shall hold and enjoy her lands free from it. The first chapter of *Roper* on Husband and Wife, opens with this statement of the right of the husband in the freehold lands of the wife: "By the inter-marriage the husband acquires a freehold interest during the *joint* lives of himself and wife, in all such freehold property of inheritance as she was seized of at that time, or may become so during the coverture. Upon this freehold there may be a *remitter*. The husband alone may make a tenant to the *proœcipe* for suffering a recovery; and he may take a release or confirmation to enlarge his estate; but if he be attainted of felony, the King will not acquire the freehold, it remaining in the wife, but the pernancy of the profits only, during the coverture. The husband's interest may be defeated by the act of the wife *before* the birth of issue. If, therefore, she be attainted of felony, the lord by *escheat* may enter and eject the husband so soon as it appears by due process that the king has had his prerogative forfeiture of a year, day, and waste; but not so if the attainder happen *after* the issue are born, for then the husband is entitled to an estate for his own life, and in his own right, as tenant by the curtesy *initiate*. *After* the birth of issue, the husband *alone* is entitled to do homage to the lord for the lands, but before issue born he and his wife must have performed

that service together; so that, upon the birth of issue, the husband becomes tenant to the lord, which necessarily prevents an *escheat* to him for felony committed by the wife."

It thus appears that the tenancy, which is *consummate* only upon the death of the wife, is *initiate* upon the birth of issue, and that thenceforward the husband has an estate in his own right; therefore it is not altogether inaccurate to provide for the cesser of the estate by the curtesy by declaring that the wife shall hold her lands free from it.

For these reasons, after anxiously considering the question, and with the feeling that as my opinion differs from that of my colleagues it is very likely wrong, I am obliged to hold that the Act of 1872 barred the right of the husband to curtesy in the lands of his wife, and that the marginal note, which is in these words, "Tenancy by the curtesy abolished in certain cases," correctly gives the effect of the first section.

I therefore think the appeal should be dismissed.

MORRISON, J. A., concurred with Moss, C. J. A.

Appeal allowed.

DENISON V. LESSLIE.

R. W. Co.—Action by creditors against shareholder—Proof of defendant being a shareholder.

Where a creditor of a company is proceeding by *scire facias* against a shareholder he must bring the defendant within the precise terms of the statute by showing that he is in the strictest sense a shareholder.

In an action against defendant as a shareholder for unpaid stock, it appeared that the defendant signed the stock book, which was headed with an agreement by the subscribers to become shareholders of the stock for the amount set opposite their respective names, and upon allotment by the company "of my or our said respective shares" they covenanted to pay the company ten per cent. of the amount of said shares and all future calls. The directors subsequently passed a resolution directing the secretary to issue allotment certificates for each shareholder for the shares held by him. The secretary accordingly prepared such certificates, which certified to the subscriber that the company in accordance with his application for — shares * * had had allotted to him — shares amounting to —. The certificates were delivered to the company's broker to deliver to the shareholders. There was no evidence to shew any formal notification to the defendant of the above resolution, or that a certificate of allotment had been issued; and he never paid the 10 per cent. He, however, admitted that he had received notices asking for payment, and that he supposed the first notice he received was for the 10 per cent. The evidence shewed that he did not consider that he was entitled to any notice, and that he based his belief that he was not a shareholder simply on the ground that he had not paid the 10 per cent.

Held, affirming the judgment of the Queen's Bench, 43 U. C. R. 22, that the evidence was sufficient to prove that knowledge of the acceptance of his offer by the company had reached the defendant and that he was therefore liable as a shareholder.

Held, also, that it was not *ultra vires* of the directors to take defendant's subscription for stock without at the same time receiving payment of the 10 per cent. thereon.

This was an appeal from the judgment of the Queen's Bench discharging a rule *nisi* to enter a verdict for the defendant, reported 43 U. C. R. 22. The pleadings and facts are fully stated there, and in the judgment on this appeal.

The case was argued on the 21st of May, 1878 (a).

W. Macdonald, for the appellant. The defendant's liability depends on the existence of a contract between the defendant and the Railway Company, by virtue of

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which the defendant became a shareholder. The plaintiff's claim is therefore through the company: *Bullivant v. Manning*, 41 U. C. R. 517; *McIntyre v. McCracken*, 37 U. C. R. 422; 1 App. R. 1, 1 Sup. Court, 479; *In re British Farmers, &c., Nicholl's Case*, 26 W.R. 45. In determining whether such a contract were made, the same principles are applicable as those that govern in ordinary cases between any two parties; and no stronger inference is to be drawn as to the existence of a contract in favour of a creditor than in favour of the company: *Brice on Ultra Vires*, ch. 8, 2nd ed. p. 337, 342; *Hebb's Case*, L. R. 4 Eq. 9; *Pellatt's Case*, L. R. 2 Ch. 527, 535 per Lord Cairns; *Gunn's Case*, L. R. 3 Ch. 43-44; *Ritso's Case*, L. R. 4 Ch. Div. 775. No contract is shewn between the company and the defendant. The memorandum signed is only an application or offer to take stock, and is recognized as such by the company: *Bullivant v. Manning*, 40 U. C. R. per Wilson, J., p. 520. By its terms it contemplates something yet to be done, which it was optional for the company to do or not to do, viz., "allotment," before the defendant became entitled to the stock, so that there was no mutuality of obligation and therefore no contract: *Shackleford's Case*, L. R. 1 Ch. 567; *Elkington's Case*, L. R. 2 Ch. 511; *Harrison's Case*, L. R. 3 Ch. 638; *Wallis's Case*, L. R. 4 Ch. 325; *Pellatt's Case*, L. R. 2 Ch. 528; *Addinell's Case*, L. R. 1 Eq. 225; *Mackley's Case*, L. R. 1 Ch. D. 247; *Ritso's Case*, L. R. 4 Ch. D. 774; *Lake Superior Navigation Co. v. Morrison*, 22 C. P. 217; *Routledge v. Grant*, 4 Bing. 653. The test of the liability of a subscriber is whether anything was done by the company to admit the shareholder, otherwise there is no consideration for the promise, and if stock were at a premium the applicant could not claim it: *Angell & Ames on Corporations*, 552 10th ed. Although the Act 31 Vic. cap. 41, incorporating the Railway Company, does not require allotment, yet allotment of certain shares being one of the terms upon which the defendant made his offer, in order to constitute a contract there must have been allotment communicated; but no allotment was ever made to the

defendant. The entry in the Minute Book of the Company, 1st July, 1869, by its very terms only related to those who were already at the time of such minute *shareholders*; and the certificate prepared in the terms of such minute was not communicated to the defendant, but handed to the company's own agent, and the defendant had no notice of it whatever. Neither was there any act of his, such as payment, attending meetings, voting, &c., from which allotment, acceptance by the company of the offer, or notice to the defendant could be inferred. Allotment must be communicated within a reasonable time, and notices of the kind put in, dated 22nd January, 1872, even if they constituted an acceptance, were not sent within a reasonable time after the offer; and the defendant long before the earliest of such notices, without any notice to the company, or formal withdrawal of his offer, was justified in assuming that the matter was off: *Benjamin* on Sales, 2nd ed., p. 33; *Graham v. Van Dieman's Land Co.* 11 Ex. 101; *Duke v. Andrews*, 2 Ex. 290; *Brice* on Ultra Vires, 345, 648, ed.; *Crawley's Case*, L. R. 4 Ch. 327; *Bargate v. Shortridge*, 5 H. L. C. 297; and it is quite consistent with the evidence that defendant before receipt of these notices withdrew his offer. Such notices were not an acceptance of the proposal, but "dunning letters," written upon the assumption that a liability previously existed, which is no evidence of a contract: *Emmott v. Riddell*, 2 F. & F. 142; *Ramsgate, &c. v. Montefiore*, 4 H. & C. 164. Under sec. 28 of 31 Vic. ch. 41, O., there was no authority to make calls till the ten per cent. payment on subscription was made. The contract made, as found by the Court of Queen's Bench, was one which it was beyond the power of the directors to make. Their powers created and therefore limited by the terms of the Act are to open stock books: secs. 7-27, and to receive subscriptions in such a mode as would forthwith make the company liable to give the stock and to receive payment forthwith upon subscription. Section 27 is clearly mandatory. The fact of the Legislature directing a contract, which without such direction might lawfully

be made in a great variety of ways, to be made in one particular way shews the intention that it could only be made in the way directed. Compare 32 Vic. ch. 42, sec. 14, O. with 31 Vic. ch. 41, secs. 1, 14, 15, 17, 18, 24 and 27, O. of the same session. Moreover the payment of ten per cent. on all stock was essential to the organization of the company, and anything which delayed the payment imperilled the legal organization of the company, inasmuch as speedy organization was essential to the existence of the company: Sec. 33, 31 Vic. ch. 42; *Brice on Ultra Vires*, 68, 652 2nd ed.; *Barnett's Case*, L. R. 18 Eq. 507; *Bargate v. Shortridge*, 5 H. L. Cas. 318; *Caledonian R. W. Co. v. Helensburgh*, 2 Macq. H. L. 405, 406. If the agreement is *ultra vires* of the directors, it is not binding on the company, and therefore not binding on the defendant for want of mutuality: *Pellatt's Case*, L. R. 2 Ch. 528; *Bridger's Case*, L. R. 9 Eq. 78. Payment of ten per cent. forthwith upon subscription was a condition of becoming a shareholder, and without such payment the defendant did not become a shareholder, nor could he have compelled the company to allot the stock had it been at a premium: 31 Vic. ch. 42, secs. 1, 4, 15, 17, 18, 24, 27, O.; and the defendant is not taking advantage of his own default in not paying because he did not offer to pay upon subscription, therefore he is not now setting up his own wrong: *Union Turnpike Road v. Jenkins*, 1 Caines N. Y. 381, reversed by Court of Error, 1 Caines's Cases in Error, 86; *Wood v. Coosa and Chattooga R. W. Co.*, 32 Geo. 274; *Erie and Waterford P. R. Co. v. Brown*, 1 Casey Pa. 156; *Garrett v. Dillsburgh R. W. Co.*, 78 Pa. St. 465; *Wright v. Shelby R. W. Co.*, 16 Ben. Munroe, Ky. 4; *Port Dover R. W. Co. v. Grey*, 36 U. C. R. 426; *Moore v. Murphy*, 11 C. P. 444; *Goshen Turnpike Co. v. Hunter*, 9 Johns. 217; *Highland Turnpike Co. v. McKean*, 11 Johns. 98; *Dutchess Colton Manufacturing Co. v. Davis* 14 Johns. 238; *Oriental, &c., Co. v. Briggs*, 5 L. T. N. S. 477. The plaintiff had no right to assume that the defendant was a shareholder and credit the company accordingly, by reason of his signature to a document which, on its face, is merely

an application for shares, and consequently no question can arise as to the defendant having misled the plaintiff to his disadvantage.

T. Kennedy, for the respondent. The Statute 31 Vic. ch. 40 O., incorporating the Toronto, Grey, and Bruce Railway Company, expressly imports into itself the clauses in the Railway Act (Consol. Stat. C. ch. 66), relating to calls, shares, and their transfer; and sub-sec. 19, sec. 7, defines a shareholder to mean "every subscriber to and holder of stock in the undertaking," and the appellant, therefore, without any further act on his part or that of the company, became a shareholder by subscribing as he did, and is liable: *Lake Superior Navigation Company v. Morrison*, 22 C. P. 217; *Davidson v. Grange*, 4 Gr. 380. By sec. 9 power is given to provisional directors, among other things, "To open stock books, to make a call upon the shares subscribed therein, and to call a meeting of the subscribers thereto for the election of other directors." It appears by the evidence that C. J. Campbell, a provisional director, canvassed the appellant to take shares on behalf of the Company, and as such director obtained his signature and seal to the stock book for ten shares of \$100 each, and the appellant, without any further act, became a shareholder. The document executed by the appellant being a covenant to pay, and being under seal, the mere assent of the company is sufficient, and such assent would be inferred if it be shewn, as in this case, that the document was not repudiated by the company, and that the company acted on it by advertising for calls thereon and collecting the stock subscribed therein. The evidence shows that the company assented to the subscription by the appellant, by sending him notices to pay up calls, by the secretary of the company in his capacity as such requesting payment of the calls overdue, and the appellant himself admitted that he was a shareholder by requesting the individual directors to try and take his name off the stock book. Even if allotment were necessary, such allotment can be implied from facts showing the acceptance of the offer, and

sufficient facts appear in the evidence here to show that the appellant was aware of such acceptance of his offer : *Levita's Case*, L. R. 3 Chy. 36. The evidence shows that there was no delay on the part of the company, as the appellant admits receiving notice calling upon him for the 10 per cent., which in itself is sufficient notice of assent or allotment on the part of the company, and if the appellant once became a shareholder, no action of the company could relieve him from his liability to a creditor of the company : *Ellington's Case*, L. R. 2 Ch. 511 ; *Rogers's Case*, *Harrison's Case*, L. R. 3 ch. 638. Sec. 27 is merely directory, and the payment of the 10 per cent. is not a condition precedent to defendant becoming a shareholder : *Port Dover Railway Co. v. Grey*, 36 U. C. R., p. 428. Sec. 28 refers not to the payment of the 10 per cent., but to the deposit in the chartered bank of sufficient of the 10 per cent. under sec. 14 of the same statute. The defendant having permitted himself to appear as a shareholder cannot now, after the rights of creditors have intervened, claim to be relieved : *Bullivant v. Manning*, 41 U. C. R. 517.

January 16, 1879. (a) Moss, C. J. A., delivered the judgment of the Court.

For the proper consideration of this case it is important to keep in view the nature of the remedy which the plaintiff is seeking to enforce. He is proceeding against a person whom, in spite of his opposition, he endeavours to place in the position of a shareholder in The Toronto, Grey, and Bruce Railway Company, upon a *scire facias* issued after an execution against the company has been returned unsatisfied. It is well settled by a series of decisions that where a creditor is pursuing this peculiar remedy he must bring the defendant within the precise terms of the statute by showing that he is in the strictest sense a shareholder. The creditor is not entitled to sue a person merely because he has dealt with and been treated by the company as a shareholder, and might, upon the principle of estoppel, be liable in that

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character to the company itself; nor is the creditor disabled from recovering against a person who has not ceased to be a member according to the regulations, although he has been treated by the company's officers as no longer an actual shareholder. In the well-known case of *Ness v. Angas*, 3 Ex. 812, this doctrine is stated with great distinctness by each of the learned barons, who took part in the judgment. Pollock, C. B. said: "I do not think we are at liberty to create an equity, as it were, arising out of the statute, and to say that every person who might be sued in consequence of representations or conduct tending to show that he was a shareholder, and which, as against him, would be evidence that he was such, can be considered as a member for the purpose of this proceeding by *scire facias*. A creditor who seeks to derive a benefit under this particular statute must shew that his case comes precisely within the words of it." The language of Rolfe, B., at p. 813, was, "The real question is, what is the meaning of the Legislature in using the words 'a member.' Does it mean strictly a member, or does it mean a person who has so conducted himself as to leave it to be supposed that he is a member? In my opinion the meaning is, that the party must be a member in the strictest sense of the word." Platt, B., made use of similar observations.

This doctrine was acted upon in many other cases, as for example, *Ness v. Armstrong*, 4 Ex. 21; *Moss v. Steam Gondola Co.*, 17 C. B. 180; and *Bailey v. Universal Provincial Life Ass. Co.*, 1 C. B. N. S. 557. It was also adopted in the Courts of this Province, as in *Woodruff v. Corporation of Peterborough*, 22 U. C. R. 274, where the present Chief Justice of the Queen's Bench observed, that *Ness v. Angas* and *Ness v. Armstrong* go to prove that such a remedy, given by express enactment and opposed to the common law, must be strictly pursued, and no defendant can be made liable except he be brought within the express words of the statute. Whatever equity may be created as between him and the company or the stockholders, very different considerations arise when the question is whether a person is liable to be placed on the list of contributories.

This is very clearly shewn by the judgment of Lord St. Leonards in the case of *Straffon's Executors*, 1 D. M. & G. 576, where reliance was placed upon *Ness v. Angas*, 3 Ex. 812, and similar decisions. His Lordship points out in answer to that argument that those cases are distinguishable, as they depended upon a particular Act of Parliament, and therefore a man could not be proceeded against by a *scire facias*, unless it could be shewn that he was legally liable as a member, but those authorities were not applicable to the case of a contributory. The recent authorities in England are concerned with questions of the liability to be made a contributory, and consequently a decision may happen not to furnish any real assistance towards the determination of a case like the present. I have thought that I may be pardoned for directing more attention to this distinction, than the circumstances of this case actually require, because it is not uncommon to find it overlooked, and decisions under the winding-up Acts cited as if they were directly applicable to a case like the present.

By the Act incorporating the Toronto, Grey, and Bruce Railway Company, 31 Vic., ch. 40, O., provisional directors were named, with authority to open stock-books, and to *make a call* upon the shares subscribed therein. It was their duty upon a certain amount of shares in the capital stock being subscribed, and ten per cent. paid, to call a general meeting of the subscribers who should "have so paid up the ten per cent. thereof, for the purpose of electing directors." It was provided that at such meeting the subscribers for the capital stock assembled, who should have so paid up ten per cent. thereof, with such persons as might be present, should choose the directors. The 27th section required that on the subscription for shares of the capital stock each subscriber should pay forthwith ten per cent. of the amount subscribed by him, and that the directors should deposit the same in some chartered bank to the credit of the company. I may pause here to notice the argument based upon this section, that it was *ultra vires* of the directors to accept a subscription

unless it were accompanied by a present payment of ten per cent. It does not appear to me that that is a conclusion reasonably deducible from the section itself. But it seems to me that other portions of the Act make it clear that the directors might solicit subscriptions, and after a sufficient number had been received demand the payment of the ten per cent. It is not probable that the promoters of the Act failed to anticipate the unwillingness which persons called upon to subscribe would feel to pay any money, until there had been subscriptions enough to secure organization. The 7th section, which empowers the provisional directors to open stock-books, also authorizes them to make a call upon the shares subscribed therein, which I take it can only refer to the first payment of ten per cent., an unnecessary provision if it were absolutely imperative that each subscriber should pay at the moment of subscription. Again the persons entitled to vote at the first meeting are the subscribers who have paid up ten per cent. It does not appear to be a forced construction to hold that this contemplates the possibility of persons being subscribers, and not having paid the ten per cent.

The course that the directors actually did take here was to procure signatures under a heading, by which the subscribers agreed with the company, and bound themselves to become holders of the capital stock for a certain number of shares, and upon the allotment by the creditors of their shares to pay to the company ten per cent. of the amount of the share, and to pay future calls. On the 2nd of June, 1869, the defendant subscribed in this manner for ten shares, amounting to \$1,000. On the 1st of July, 1869, the directors passed a resolution by which the secretary was directed to issue an allotment certificate to each shareholder for the amount of shares held by him. A printed form of certificate was prepared, which certified to the subscriber that the company, in accordance with his application for — shares of \$100 each of their capital stock, had allotted to him — shares, amounting to \$—, the first instalment thereof being payable forthwith, and upon which was

endorsed an acknowledgment of the receipt of a sum of money, "being amount of first instalment of ten per cent. on the amount of stock allotted by within certificate." A ledger account was also opened with each subscriber in the books of the company. During the argument I felt some doubt whether anything more was necessary to complete the liability of the defendant, than the mere fact of recording him as the holder of, and thus allotting to him, ten shares. Further consideration, however, has satisfied me that the Court below was quite right in holding that the additional fact of communication in some manner to the defendant of this allotment was essential. The document which the defendant signed was a mere unilateral agreement, imposing no obligation upon the company to allot him any shares. Under such circumstances the language of Lord Cairns, in *Pellatt's Case*, L. R. 2 Ch. 527, is directly applicable. He says, at p. 535, that where an individual applies for shares in a company, there being no obligation to let him have any, there must be a response by the company, otherwise there is no contract; and this is the rule, which has been consistently acted upon in subsequent cases. Although this document uses words importing an agreement, it does not in substance differ from an application. A reference to the terms of the certificate of allotment will shew that that is the sense in which it was understood by the company. I concur, therefore, in the view of the Court below, that the question is whether the company made a response to the defendant's application. I also agree that there is no evidence of any formal notification to him that the resolution of the 1st of July, 1869, had been passed, or that a certificate of allotment to him had been issued.

It appears that these certificates were sent to the office of brokers who had been engaged in procuring subscriptions, and that they were to sign the endorsed receipts upon being paid the ten per cent. One of these gentlemen was a witness in the case, but no question was proposed to him on this point, and the defendant denied ever having

seen or heard of such a certificate. It is not even shewn what was the method adopted for informing subscribers that the certificates were with the brokers.

It appears from the defendant's testimony that he received some notices asking for payment, and that he thinks they were mere notices of calls, and that he has no recollection of being asked for the ten per cent. He said, however, that he supposed the first notice he received was for the ten per cent.

I think it is quite obvious from his statement that he never expected to receive any notice of allotment, but that he had in some way formed the opinion that he was not a stockholder, because he had not paid the ten per cent.; and I have no doubt that it was in consequence of the officers of the company sharing this view that no efforts were made to enforce payment from him beyond sending him the ordinary notices. His language seems to be quite unmistakable. Speaking of the notice, he says: "I paid no attention to it, as I did not consider myself a stockholder, not having paid the ten per cent. I may have got notices like the circular read in Court." This was a form of the circular demanding payment of calls. "The first notice I received I suppose was for the ten per cent. I did not know but what these notices were a repetition of that first demand."

If the last sentence contains a correct report of his language, it indicates that he thought the company kept persisting in the demand of the ten per cent. About a couple of years before the trial, as he supposes, he asked the President to have his name erased from the book, as he did not consider himself a stockholder, and had "no connection with the concern beyond subscribing." The Secretary-Treasurer proved that a second call was made on the 16th February, 1870, and that the eight subsequent calls were made at intervals extending to the month of March, 1873. The irresistible inference from his evidence, coupled with that of the defendant, is, that all these notices reached the defendant, and were disregarded by him. Five or six years ago the Treasurer asked him for payment, when, according

to the recollection of that gentleman, the defendant told him he did not consider he ought to be called upon to pay anything, but did not assign any particular reason.

I think that this is all the material evidence, and upon it the Court below has refused to set aside the verdict entered for the plaintiff at Nisi Prius.

The learned Judge, by whom the case was tried without a jury, did not make any specific findings, and we do not know whether his attention was expressly directed to, or whether he formed any opinion upon, the point which now seems to be deemed the cardinal one in the case, namely, whether upon the evidence it should be held that the defendant knew that the company had accepted his application for ten shares. As is pointed out in the judgment of the Court, a formal notice need not be shewn; it is only necessary that there should be evidence, whether of conduct or otherwise, sufficient to satisfy the judicial mind that the knowledge of an acceptance of his offer had reached the applicant. This makes it especially regrettable that the opinion of the learned Judge was not obtained, for I think that it would have been practically conclusive. At least, speaking for myself, I should never have ventured to question its correctness upon this evidence.

Upon a review, however, of the whole testimony, which I have summarized, the Court held that the verdict ought not to be disturbed. This appeal is against their judgment, and we would not be justified in allowing it, unless we were satisfied that they were clearly wrong. Such an opinion we have not been able to form.

The absence of any expectation by the defendant that he was entitled to notice, which would naturally lead him to attach no great importance to its receipt, his belief that he was not a shareholder, simply because he had not chosen to pay the ten per cent.; his idea, albeit it may have been a mistaken one, that the first demand was for payment of this ten per cent.; his failure at any time, and even when in the witness box, to set up his want of knowledge of the acceptance; his request to be removed from the list of

shareholders, not because the company had failed in its duty of notifying him, but because he had himself done nothing but subscribe the book; the receipt by him of notices, one of which must be taken to have reached him in February, 1870, and of each of which the unambiguous import was, that the company considered him to be a shareholder; the absence of any repudiation on the ground of want of acceptance—all of these circumstances furnish evidence from which it may be fairly inferred that he had full knowledge that his application had been accepted. Indeed, as is suggested in the judgment of the Court, there is no reason to suppose that there was such keen competition for shares that it ever entered into the imagination of the defendant that his application might be declined. On the contrary, very hard canvassing seems to have been necessary to procure signatures.

It was pressed upon us that by reason of his default in the payment of the ten per cent., the defendant never became entitled to the rights of a shareholder. That is very true, but it does not assist him when he is contending that he is not subject to the same liabilities as a subscriber who had to that extent fulfilled his contract.

By the Railway Act every subscriber to, or holder of stock in the undertaking is a shareholder, and as such liable to creditors of the company to the extent of his unpaid stock. The defendant was a subscriber and holder of stock, as soon as the shares were allotted to him and he was informed thereof. He became liable to pay the ten per cent. forthwith, and the subsequent calls as they were made; and we think he cannot set up his own failure to pay the ten per cent. in answer to the plaintiff's demand.

In our opinion he was, if the finding of the Court that he had knowledge of his acceptance by the company be correct, a shareholder within the terms of the Act.

We have already intimated an opinion that there is no sufficient ground shewn for dissenting from this conclusion, and we must therefore dismiss the appeal, with costs.

Appeal dismissed.

SHEPLEY V. HURD ET AL.

Promissory note—Lawful holder—Discharge of surety.

A firm of solicitors, in whose hands a note had been placed for suit, got the authority of the plaintiff, who was then a clerk in their office, to use his name for the purpose of the suit.

Held, reversing the judgment of the County Court, that he was the lawful holder.

The holder of a note, to which one of the defendants was a surety, accepted a new note from the principals without his knowledge or consent on the understanding that he would not proceed on the original note which he retained, unless the fresh note was not paid at maturity.

Held, that the surety was discharged, and that there was no reservation of the remedy against him.

The fact that a party joins in a note as a surety to enable the principals to raise money to apply towards the discharge of certain obligations to him does not prevent his being a surety.

An appeal having partially succeeded and partially failed, no costs were given.

THIS was an appeal from the County Court of the County of York.

Declaration on a promissory note made by Abner H. Hurd, P. A. Hurd, and Thomas C. Foreman, dated 13th March, 1874, for \$250, payable six months after date.

Pleas: 1. Did not make the said note.

2. Not the lawful holder.

3. Satisfaction and discharge before action.

4. By the defendant Foreman, on equitable grounds, that he made the said note without consideration, as surety for the other defendants, and not as principal, and the said George Wilkinson received the said note from the said other defendants with the full knowledge, agreement and understanding that the defendant, F., was a surety as aforesaid, and was not otherwise concerned in or party to the note; and after the note became due, the said Wilkinson delivered the note to one John Ianson, who for a good and valuable consideration, and while he was holder of the note, gave time to the other defendants for the payment of the note, and accepted from the other defendants their certain promissory note by way of renewal and extension of the time for the payment of the note, without

the consent of the defendant F., and the plaintiff first received and had the note after the same became due, and after the giving of time by Ianson to the other defendants as aforesaid, whereby the defendant F. became in equity and good conscience discharged from liability on the note.

Issue.

The facts are sufficiently stated in the judgment.

The cause was tried before McKenzie, County Judge, without a jury, at the Fall Sittings, when a verdict was entered for the plaintiff. Subsequently a rule *nisi* to enter a nonsuit or verdict for the defendants was made absolute.

From this decision the plaintiff appealed.

The appeal was argued on the 15th January, 1879 (a).

Bain for the appellant. The learned Judge was clearly wrong in holding that the plaintiff was not the lawful holder of the note sued on. The plaintiff swears that it came into his hands for suit, and there is nothing to contradict his evidence on this point. The law is well settled that a party having a beneficial interest in a note may give it to another for suit, [Moss, C. J. A.: Is it necessary that it should be in more than his constructive possession?]: *Ancona v. Marks*, 7 H. & N. 686; *Law v. Parnell*, 7 C. B. N. S. 282. It cannot be contended that Foreman was a surety. Being in the nature of a principal, the onus was on him to shew clearly that he was a surety, but he failed to do so, and the Judge so found at the trial. But even if he was a surety, there was nothing done by Ianson by which he lost his rights against him. The Hurds agreed that Ianson might hold Foreman for the debt, and the fact that he took a new note from them did not release Foreman: *Addison on Contracts*, 867.

McMichael, Q. C. The note in question was neither in the plaintiff's actual or constructive possession. The beneficial holders merely used his name, in which case *Emmett v. Tottenham*, 8 Ex. 844, decides that he is not the lawful

(a) *Present*.—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

holder. The evidence abundantly proves that Foreman was a surety, that time was given to the Hurds without any notice to him, and that no rights against him were reserved before taking the new note from the Hurds. Ianson could not have sued Foreman separately, and had he sued the other two, they could have pleaded payment.

January 14th, 1879 (*a*). Moss, C. J. A., delivered the judgment of the Court.

The controversy in this case turns upon the second and fourth pleas. The learned Judge of the County Court at the trial entered a verdict for the plaintiff, but entertained some doubt whether thesecond plea, which denies that the plaintiff was the holder of the note sued upon, had not been proved. Upon the fourth plea, which sets up in the usual form that the defendant Foreman was a mere surety for the other parties, and that he had been discharged by time being given without his consent, the learned Judge decided in favour of the plaintiff, on the ground that Foreman was not shewn to be a surety.

Afterwards in term he made absolute a rule *nisi* to enter a nonsuit, on the ground that the plaintiff was not the lawful holder.

In this view we are unable to concur. The simple case is this: that the note being placed in the hands of a firm of solicitors, they got the authority of the plaintiff, who was then a clerk in their office, to use his name for the purpose of the suit. It is not clear, nor is it material whether the solicitors had a beneficial interest in the note as security for costs due to them by one Ianson, by whom it was held. For some reason it was wished to take the proceedings without Ianson's name appearing, and accordingly the plaintiff consented to sue as trustee. No attempt was made to secure any unfair advantage by the adoption of this mode of procedure.

It was said that the plaintiff never had the physical possession of the note, but we apprehend that that is by no means essential. Moreover, his evidence was that the

note had been handed to him to be sued upon, and from the tenor of his evidence the natural inference would seem to be that it had been delivered to him as a clerk in the common law branch of the office.

The case, therefore, is much stronger for the plaintiff than in *Ancona v. Marks*, 7 H. & N., 686, where the plaintiff's name was used without his knowledge or assent, but his subsequent ratification of such use was held sufficient.

But the defendant Foreman contends that even if the decision complained of is erroneous, he is entitled to succeed on the fourth plea, and we think that this position is well taken. The learned Judge ruled against the defendant on the ground that he was not shewn to be a mere surety, or accommodation party to the instrument. With great respect for the opinion of the learned Judge, we think it clear that he proceeded upon a misconception of the true effect of the evidence. There is no dispute about the facts themselves, and the only question is the proper inference to be drawn. The defendants, the Hurds, were desirous of procuring from Mr. Wilkinson a loan upon the security of a promissory note. That gentleman was willing to advance the money, if a satisfactory endorser was offered, and as such he accepted the defendant Foreman. Upon the suggestion that it would dispense with the necessity of protest, if payment were not made at maturity, Foreman signed, instead of endorsing the note. But nothing can be more clearly established, and that is the material point, than that Wilkinson never treated, and without violation of his agreement never could have treated Foreman as other than a surety. The learned Judge, however, was of opinion that the relation of suretyship was not established, because it appeared that the Hurds had used this money, or some of it, to retire notes held by a Bank on which Foreman was also liable. It was also suggested, but not established with any reasonable certainty, that a portion of the proceeds had gone in payment of an ordinary store-account to Foreman. We

think that the proposition that these circumstances shew that he was not a surety, is scarcely arguable. In the first place for all that appears he may have been an accommodation party to the notes held by the bank. Indeed, there are indications in the evidence that this was his true position. But it is quite certain that he either joined in such notes for the accommodation of the Hurds, or that he had discounted with the bank, in the ordinary course of business, notes which they had made to him, and which must be presumed to have been founded upon valuable consideration. From first to last the witnesses refer to these notes as debts which the Hurds ought to pay. At most the transaction was that the Hurds being under certain obligations to Foreman, he joined in the note sued upon as a surety in order to enable them to raise money, and apply it towards the discharge of these obligations. Clearly that application of the proceeds did not prevent him from being and remaining a surety.

But it is urged that upon the evidence it is shewn that the extension of time, which unquestionably was given to the principal debtors, was accompanied by a reservation of remedies against the surety. It would be enough to say that in the present state of the record such a contention does not seem to be open to the plaintiff, who has chosen to simply join issue upon the plea. The reservation is an affirmative fact by which the creditor seeks to avoid the legal effect of extending the time, and strictly speaking, ought to be alleged by way of replication. But as an amendment in this particular might be allowed, we have thought it proper to examine the evidence bearing upon the question, and we are of opinion that such a reservation as the law requires has not been proved. The result of it is, that Ianson being desirous of lending some money to one Bunker, applied to the Hurds for payment of this note. As they were unable to meet it, it was arranged without the knowledge or consent of Foreman, that they should give their note to Ianson at three months, in order that he might get it discounted at the bank, and this was carried

out. He did not deliver up the note now in suit, his object, no doubt, being to keep the liability of Foreman as a final resource. But it is clear that the understanding was, that after the new note was discounted he should not proceed unless the makers failed to pay at maturity. He held it as a security in the event of that note not being paid, but it would have been a direct violation of the agreement between him and them to have commenced proceedings immediately against Foreman.

He seems to have supposed that he was at liberty to agree with the Hurds to stay his hand against all parties until the maturity of the fresh note, and then to proceed against them all in the event of non-payment. It is probable that he so acted in ignorance of the legal consequences, but it is needless to argue that this cannot avail him as against the rights of the surety.

As the plaintiff is entitled to succeed upon the second plea, and the defendant Foreman is alone entitled to the benefit of the fourth plea, the nonsuit was wrong, and the rule should have been made absolute only to the extent of entering a verdict for the defendant Foreman on the fourth plea.

The rule must be made absolute in the Court below to enter a verdict for the defendant Foreman on the fourth plea; and in other respects the verdict for the plaintiff must stand.

As the appeal has partially succeeded and partially failed, there will be no costs of the appeal.

IN RE CODE AND CRAIN.

Insolvent Act of 1875—Deed of composition by co-partners—Requisite number and proportion of value.

Where there are joint and separate creditors, a deed of composition and discharge although providing for all the creditors and dealing with all the estates is invalid under the 56th section of the Insolvent Act of 1875 unless the assent of the requisite proportion of the creditors of each class, joint and separate, is obtained.

Code and Crain became insolvents as a firm and individually. As co-partners they were indebted to 25 creditors. Claims to a large amount were proved against Crain individually by 29 of his separate creditors. No separate creditor of Code proved against him individually. A deed of composition and discharge providing for a cash payment of two cents on the dollar, in full of claims against the insolvents, whether as partners or as individuals, was signed by a majority of the whole body of creditors taking those who proved claims against the joint estate and against the separate estate as one class. These signing creditors also represented three-fourths of the claims proved against the joint and separate estates. The deed was also signed by a majority in number of the separate creditors of Crain, representing three-fourths of all claims proved against him individually. But the deed was not signed by a majority in number, or by representatives of three-fourths in value of the creditors who had proved against the firm.

Held, reversing the judgment of the County Court that the deed of composition and discharge could not be confirmed, as the insolvents had not obtained, within the meaning of the Insolvent Act of 1875, the assent of the proportion of their creditors in number and value required by law.

Appeal from the County Court Judge of the County of Carleton, sitting in insolvency.

This was a special case referred to the full Court under sec. 128 of the Insolvent Act.

The question upon which the judgment of the Court was sought may be thus stated :—

The insolvents, Code & Crain, were partners in the business of woollen manufacturers at the village of Ennisville, and as such partners incurred liabilities to twenty-five creditors, who had proved claims amounting in all to \$17,204. No separate creditors of Code had proved claims in this matter. Crain was also engaged in business at Ottawa, as a builder, and claims to the amount of about \$50,000 had been proved against him individually by twenty-nine creditors. A deed of composition and discharge providing for the payment of two cents on the

dollar had been signed by thirty-two creditors, whose claims amounted in all to \$55,398, but of these only twelve were creditors of Code & Crain, and they represented claims amounting to less than \$9,000. All the creditors to whom reference has been made had proved claims of \$100 or upwards. The result was that the deed had been signed by a majority in number of the whole body of creditors who had proved in the proceedings, or in other words by a majority in number of the creditors, treating as a single class those who had proved against the joint estate and those who had proved against the separate estate, and that these represented claims exceeding in value three-fourths of the aggregate of the claims proved against the joint and separate estates; that it had been signed by a majority in number of the separate creditors of Crain, and that these represented more than three-fourths in value of all the claims proved against him individually; that it had not been signed by a majority in number, or by representatives of three-fourths, in value of the creditors who had proved against the firm; and that it had not been signed by a majority in number or three-fourths in value of the creditors of the separate estate of Code, in which position the creditors of the firm stood, by reason of there being no proof by any separate creditor.

The deed, which was also executed by Code and Crain, recited that the insolvents had become involved both as partners and in their individual capacities, and their creditors, and the creditors of each of them, had agreed with them and each of them for a composition and discharge, and that the insolvents had agreed to pay the composition in cash. It contained a joint and several covenant by the insolvents, in consideration of their and each of their indebtedness, and of the discharge given to them, to pay a composition of two cents on the dollar in full of claims against the insolvents, whether as partners or as individuals, and a release by the creditors of all claims against the insolvents, both as partners and individuals; and it directed the assignee to deliver and convey the estates of the

insolvents, partnership as well as individual, to Crain. For the purposes of this case it was to be assumed that there were assets belonging to the firm, and to each of the partners respectively.

The question was, whether such a deed so signed was valid, or whether it must be assented to and executed by the requisite proportion of creditors of the firm.

The case was argued on the 26th November, 1878 (a).

Crerar for the appellant. The Legislature clearly intended that the assent of a majority in number, representing three-fourths in value of each class of the creditors, should be obtained in such a case as the present one. The Insolvent Act of 1875 cannot be worked out in any other way.

Boyd, Q.C., for the respondent. Under our Act, the deed of composition and discharge is only required to be signed by a majority in number of all the creditors, and there is nothing to militate against the conclusion that a majority of the separate creditors can bind the partnership creditors. The question, however, is really decided in our favour by the decision of this Court in *Re Walker*, 2 App. R. 265.

January 14th, 1879 (a). Moss, C.J.A., delivered the judgment of the Court.

It is argued that the question is concluded in this Court by the decision in *Re Walker*, 2 App. R. 265, but when that case is examined, it is apparent that the present point did not arise, and could not have arisen. The deed there held invalid was made by one of the insolvents only, and provided for his release and the transfer to him of the estate without any regard to the other insolvent—a very different case from the present.

It is true that the provisions of the Act relating to deeds of composition and discharge necessarily engaged

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the attention of the Court, and their import was discussed in certain aspects, but the precise point now raised could not have been presented for adjudication.

After a perusal of the observations, which I then took occasion to make, I perceive no reason for any alteration or modification. I adhere to the decision, and am still satisfied of the soundness of the reasoning upon which it proceeds, and prepared to follow it to whatever may seem its logical consequences; but as I understand it, it leaves the consideration of this case free and untrammelled. It is a positive determination that in the case of a partnership, the only composition for which provision is made in the Act, is one extending to both partners, and including all the creditors of the firm, and of the individual members. The Court were unanimously of opinion that the authorities in our own Courts, and in England, went to establish the principle that while a general deed of composition providing for all creditors, and dealing with all the estates, joint and separate, *might* be valid, a deed such as that then in question was not sanctioned by the statute. But it left untouched the question whether a deed *would* be valid, even if it provided for all the creditors, and dealt with all the estates, unless the assent of the requisite proportion of creditors of each class was obtained.

The question then being still open, I shall now endeavour to explain the views which I have formed. I ventured in *Re Walker*, 2 App. R. 265, to suggest that anomalous and unjust consequences may follow from the present state of the law. If the allegations of the present appellants, who are creditors of the firm alone, and therefore in the existing circumstances, separate creditors of Code, have even a partial foundation in fact, this case amply justifies the observation. They make the assertion that the really valuable part of the assets received by the assignee belonged to the firm. This may be wholly incorrect. It may be, as the assenting creditors contend, that this property belongs to Crain alone; but those who *bonâ fide* entertain a different opinion, in the maintenance of which they have a large interest, have

surely a natural right to have its correctness tested by an impartial tribunal. Now still assuming the dissentients to be right, what is the result of this composition? The separate creditors of Crain, who, upon the hypothesis, have no appreciable assets to which they can look, have by the assistance of some of the creditors of the firm, compelled the majority of such creditors to accept two cents upon the dollar, although in the regular course of liquidation the firm creditors would receive about twenty-five cents in the dollar. If the proceedings in insolvency went on in the regular way, the individual creditors would receive nothing, and to this they prefer two cents in the dollar, which they withdraw from the firm creditors, to whom the assets belong. I repeat that it is wholly immaterial whether the firm creditors are mistaken in their view of the condition of the estate. In view of their earnest opposition to this arrangement, there is no reason to impugn their sincerity.

It is easy to put a case of still more glaring injustice. An insolvent firm, consisting of two members, has thirty joint creditors, with claims amounting to \$100,000, who, upon a realization of the joint estate through the Court, will receive fifteen cents on the dollar. One of the partners has five separate creditors, with claims amounting to \$10,000, and his separate estate when realized will just suffice to pay them in full. The other partner has five separate creditors, with claims amounting to \$15,000, and his separate estate when realized will pay them sixty cents in the dollar. A little consideration will shew that if the principle of taking number and value *en masse* be adopted, the firm creditors could compel the separate creditors to accept a composition of twenty-seven cents on the dollar, which is about what the estate would realize for all alike. Any composition between fifteen and twenty-seven cents which the insolvents might choose to offer, would be to the direct advantage of the firm creditors, and the prejudice of the private creditors, who would by a monstrous injustice be deprived of the funds which they fondly believed the law had set apart for their benefit.

My present object in adverting to these considerations is to indicate that this case appears to be one singularly fitted for the application of the canon of construction, that where the language of the Legislature is fairly susceptible of two different meanings, that should be preferred which excludes and prevents consequences that are mischievous and unjust.

As we mentioned in *Re Walker*, 2 App. R. 265, there is a large body of English authority upon the 192nd sec. of the Bankruptcy Act of 1861, between which and the section of our Insolvent Act of 1869 there is unquestionably a close analogy. But the resemblance is by no means perfect. The section in the English Act is dealing with deeds entered into between a debtor and his creditors before the estate had been placed in bankruptcy. It provided that every deed or instrument made or entered into between a debtor and his creditors, or any of them, or a trustee in their behalf, relating to the debts or liabilities of the debtor, and his release therefrom, or the distribution, management and winding up of his estate, or any such matters, shall be as valid and effectual, and binding on all the creditors of such debtor as if they were parties to and had duly executed the same, provided certain conditions were observed. Of these the first was that there should be the assent of a majority in number representing three-fourths in value of the creditors whose debts amounted to £10 and upwards.

There might, or might not, be a *cessio bonorum* under this provision. Thus there might never be any estate to be distributed by the Court, whose jurisdiction over the debtor and creditors and others only arose upon the instrument being registered after compliance with the proper preliminaries.

The question of the validity of the deed arose in practice upon an action by a non-assenting creditor to recover his debt, or an application to restrain such an action, or a motion for leave to issue an execution, where judgment had already been recovered. There was no judicial proceeding upon which the deed could be confirmed. These features of difference will appear to be not unimportant,

when the applicability of the English authorities to the 56th section of our Act has to be determined. Now, upon the 192nd section, certain points must, I think, be taken to be conclusively settled. There is no doubt that the deed must have extended its benefits to all the creditors, and that under it perfect equality must have prevailed among them all. In the words of Lord Cairns, C., in *Re Glen*, L. R. 2 Ch. 670, to render the deed binding, there must be an assenting majority in numbers, representing three-fourths in value of the creditors whose debts amount to £10 and upwards, that is, all the creditors need not be parties to the deed, but there must be the requisite majority approving of it; and according to the natural construction of the section, it must be a deed of which the benefit will enure to all the creditors generally. In the judgment in *Re Walker*, reference is made to other authorities in which the same principles are distinctly enunciated. But in no case that I have seen, has it been expressly decided that the assent of the requisite proportion of each class was not required, or that the assent of the majority in number, representing three-fourths in value, of the creditors "*en masse*," would satisfy the statute. Still I think that a review of the cases leads to the idea that the impression upon the minds of many of the Judges who pronounced opinions on the effect of the 192nd section was, that all the creditors were to be grouped together as one class. It by no means follows, however, that if the point had been directly presented for decision, that is the conclusion at which they would have arrived. It seems to me to be a misconception of *Walker v. Nevill*, 3 H. & C. 403, to quote it as an authority for the proposition that all the classes of creditors may be consolidated into a single class for this purpose. The first point decided was, that there being joint and separate creditors and joint and separate estates, the circumstance that the different classes of creditors were placed on the same footing with regard to the composition covenanted to be paid, did not render the deed inoperative against non-assenting creditors. The correctness of this opinion has

been amply vindicated by the subsequent authorities. But the question with which we are now concerned was left undecided, because its solution was unnecessary. The language of the Court is: "It was also objected that the deed could not bind the non-assenting creditors, unless the requisite majority of each class, viz., of the joint creditors and of the separate creditors of each debtor had assented." If the Court had disposed of that objection upon its merits, it would have served as an authority in the present controversy, but it was relieved from that duty by the pleading, for the judgment proceeds: "If that be so, we think the allegation in the plea that a *majority*, &c., of the said creditors of the defendants, *and each of them* assented, &c., is a sufficient averment of such assent." I have noticed that a similar question was raised before the Lords Justices under the Bankrupt Law Consolidation Act, 1849, and that it happened that it became unnecessary for the Court to express any opinion upon the point: *Re Calvert*, 3 DeG. & J. 112.

In *Rixon v. Emary*, L. R. 3 C. P. 546, which has been more than once referred to as containing an emphatic declaration of the rule that where there are distinct classes of joint and several creditors the deed must include and bind both sets of creditors, the fact was that a majority in number, representing three-fourths in value of the joint creditors, had assented, and that a majority in number representing three-fourths in value of the only separate creditors had likewise assented. If I am not mistaken, every one of the deeds impeached in the leading cases was held invalid, except that in *Walker v. Nevill*; and I have thought that there is much foundation for the opinion of a learned author (W. D. Griffith in Archbold's Bankruptcy) that it is questionable whether any deed assigning the estate could be proved under those clauses so as to be valid except a deed assigning all the joint and separate assets, assented to by the proper majority of all the creditors taken as one class, and also by the proper majority of the joint and the separate creditors of each

debtor taken as separate classes, but where there is no assignment of property and only a release given on a mere contract to pay a composition, the case is assimilated to that of secured creditors abandoning their security and coming in on equal terms with those who are unsecured.

These observations were made on the theory, which seems to be well founded, that as against the separate creditors, joint creditors should be considered to be secured upon the joint estate, and as against joint creditors separate creditors should be considered secured upon the separate estate.

The cases to which I have been referring mainly proceeded upon the construction of the 192nd section, and as there is the resemblance which has been already noted between it and the provisions of an Act relating to and leading up to the execution of the deed of composition and discharge, they are of the highest value. But the section in our statute which directly treats of the subject of judicial confirmation, is the 56th, which has no analogue in the Imperial Act. It is upon the construction of this section, read of course in connection with the clauses *in pari materia*, that the decision must turn. With such light as we may have borrowed from English authority, we may approach the consideration of the clause. Its object is to deal with the circumstances, under which a discharge or a deed of composition and discharge shall not be confirmed by the Court. It provides that the insolvent shall not be entitled to a confirmation of his discharge, or of a deed of composition and discharge if it appears that he has not obtained the assent of the proportion of *his* creditors in number and value required by the Act, or that he has been guilty of any fraud or fraudulent preference within the meaning of Act, or of fraud or evil practice in procuring the consent of creditors to the discharge or their execution of the deed, or of fraudulent retention and concealment of some portion of his estate or effects, or of evasion, prevarication or false swearing upon his examination as to his estate and effects; or that the insolvent has not kept account books; or that if, having at any time

kept such books, he has refused to produce or deliver them to the assignee ; or is wilfully in default to obey any provision of the Act or any order of the Court.

There is no question that the term insolvent may, if the context requires it, be read as extending to a partnership, and the argument for the respondents therefore is that the first branch of this section is the same as if it said : "The partners in an insolvent firm shall not be entitled to a confirmation, if they have not obtained the assent of the proportion of the whole body of their creditors in number and value required by the Act." That is a possible interpretation, but is it the only one ? I think not. It seems obvious that that construction cannot be given to the very next branch of the sentence, which is separated from the preceding portion by a simple disjunctive. It will scarcely be contended that the fraud, or fraudulent preference, or evil practice, or prevarication, or false swearing, which is to prevent confirmation, must be predicable against both parties.

If an application be made for the confirmation of a deed of composition and discharge of A and B, I apprehend that a creditor may successfully object that A has been guilty of fraud. The result will be that confirmation must be refused. The Court will say : A has been guilty of fraud ; the deed, which seeks to discharge him, cannot be sustained ; and B, however innocent, must take the consequences of his unfortunate connection with such a partner, one of which is that he must be content to obtain his discharge in the ordinary way. In such a case, it is true, a deed of composition and discharge is impossible, but that is what the law intends, because it could not be sustained without giving A that discharge which he has forfeited by his misconduct.

Now, I do not see any sufficient reason for saying that the first branch of the section shall not be read in a like sense. If the second and succeeding grounds of objection apply to the partners separately, and relate to individual disabilities, why should the first be confined to them conjointly ?

If the Court can refuse confirmation, because A. has been guilty of fraud, why should it not take the same course if A. has not obtained the assent of the requisite proportion of *his* creditors? Such a construction, instead of straining the language of the Act, is in accordance with its natural and primary signification. It is in harmony with the context, and fits in with the general scheme of the independent rights and interests of joint and separate creditors. It is at least one of two possible interpretations, and should, in my judgment, be preferred, because it prevents or checks the abuses which the other tends to encourage.

Since the argument we have been referred to the case of *Gelinas v. Drew*, 3 Quebec L. R. 361, decided by the Court of Review in the sister Province of Quebec. In the elaborate judgment pronounced by Meredith, C. J., it is held, in accordance with the view of the Statute already explained by this Court, that there can be only one deed of composition on in the case of a partnership, and that a deed making an arrangement with one of the partners only was invalid. The learned Chief Justice also expressed the opinion that if such a separate composition were possible the statutory majority required for the discharge of one of the partners, and the reconveyance of his estate, would be the statutory majority of the whole of his co-partnership and separate creditors counted together. There are weighty considerations in support of that opinion, but the question does not now arise. There is, however, no inconsistency between that opinion and our present judgment. The appeal must be allowed, with costs, and the order of the learned Judge rescinded and confirmation of the deed refused.

BURTON, PATTERSON, and MORRISON, JJ.A., concurred.

Appeal allowed.

EGLESON V. HOWE.

Assignee of mortgage—Right of set-off.

A purchaser who has taken a conveyance and given a mortgage for the purchase money had been compelled to pay off a prior mortgage, under threat of proceedings being taken against the land by the prior mortgagee. The purchaser had taken a covenant from the vendor for the discharge of this prior mortgage.

Held, reversing the decision of HARRISON, C. J., sitting alone, and overruling *Henderson v. Brown*, 18 Gr. 79, that as against an assignee of the mortgage made by the purchaser with notice of these facts, the purchaser has no equity to set-off or deduct from the mortgage assigned what he has paid on the first mortgage, subsequent to the assignment.

APPEAL from the Court of Common Pleas.

Declaration: For that the defendant, by deed bearing date the third day of December, in the year of our Lord one thousand eight hundred and seventy-four, covenanted with the said Richard Birch, to pay to the said Richard Birch \$812.50, and interest thereon at the rate of seven per centum per annum, as follows: that is to say, the said principal sum in six equal annual instalments of \$131.45 each, with interest, at the rate aforesaid, on the whole of the principal money remaining unpaid, with each instalment, on the first day of December in each and every year thereafter until the whole of the said principal money and interest would be fully paid, and that if any default should at any time happen to be made of, or in the payment of, the interest money aforesaid or any part thereof, then, and in such case the said principal money and every part thereof should forthwith become due and payable in like manner, and with the like consequences and effects, to all intents and purposes whatsoever as if the time therein mentioned for the payment of such principal money had fully come and expired. And the defendant paid the first two instalments of the said principal and interest money, and the third instalment of the said principal and interest money, amounting to wit, to the sum of \$135 for principal, and \$37.92 for interest money, became and was due and payable on the first day of December, A.D. 1877, and the defendant hath not paid the said last-mentioned instalment

of principal and interest money, or either of them, or any part thereof, but therein hath wholly failed and made default, contrary to his said covenant, whereby the whole of the unpaid principal and interest money aforesaid hath become and is due and payable, but the defendant hath not paid the same or any part thereof. And the said Richard Birch, by deed bearing date the 21st day of July, A.D. 1876, for valuable consideration, duly assigned to the plaintiff the said first-mentioned deed and covenant of the defendant and the said unpaid principal and interest money thereby secured and covenanted to be paid as aforesaid, and all the right and interest of him the said Richard Birch, therein and thereto. And the plaintiff claims \$1,000.

Fourth plea: On equitable grounds, the defendant says that he purchased from one Richard Birch certain lands in the Province of Ontario, and the said Birch, by deed made in pursuance of the Act respecting Short Forms of Conveyances, bearing date the third day of December, 1874, conveyed the said lands, in fee simple, to the said defendant, in consideration of the sum of \$1,062.50, as in the said deed mentioned, the said lands then being subject to a certain incumbrance, by virtue of a certain indenture of mortgage theretofore made by the said Birch to one Joseph James Gormully, to secure the payment of the sum of \$1,500 as in the said mortgage to the said Gormully mentioned, and the said Birch, in and by the said deed to the said defendant, agreed to pay off, satisfy and discharge the said mortgage to the said Gormully, and the said Birch in and by the said deed to the said defendant covenanted with the said defendant in the form in the schedule to the said Act prescribed in the words following: "That he has the right to convey the said lands to the said party of the second part, notwithstanding any act of the said party of the first part," and the said Birch thereby also further covenanted that he, the said Birch, would pay off and discharge and satisfy all interest then due or thereafter to become due upon the said mortgage to the said Gormully, and truly save, defend and keep harmless and indemnified

the said defendant of, from and against the said mortgage, and of, from and against all action or actions, suit and suits, costs, charges and expenses, in respect of the said mortgage, or in any way relating thereto, and the said defendant then paid to the said Birch the sum of \$250 on account of, and in part payment of the purchase money of the said lands, and then, in pursuance of the contract of purchase, and as part of the same transaction made to the said Birch, by deed bearing date the said third day of December, A.D. 1874, a mortgage upon the same lands so purchased by him as aforesaid, for securing the balance of the said purchase money, namely, \$812.50, which is the said deed in the said declaration mentioned, and the said covenant in the said declaration mentioned was made by the said defendant, in consideration of the balance of purchase money then being due from the said defendant to the said Birch, as aforesaid, and not for any other consideration whatsoever, and the said deed from the said Birch to the said Gormully, and the said deed from the said Birch to the said defendant, and the said deed from the said defendant to the said Birch, were all of them duly registered in the proper registry office in that behalf before the assignment of the said covenant to the plaintiff, as in the declaration alleged, and the said Birch did not pay off and discharge the said mortgage to the said Gormully, but therein made default and did not pay the said principal sum secured by the said mortgage as aforesaid, which became due on the second day of November, A.D. 1877, nor the interest thereon, and the defendant was notified by the said Gormully that the said mortgage from the said Birch to the said Gormully was in default, and that he, the said Gormully, intended to foreclose his said mortgage upon the said lands, so purchased by the defendant, as aforesaid, and to eject the defendant from the possession of the said lands, and the defendant thereupon, and in order to protect the lands so purchased by him as aforesaid, and before any default had been made in the said mortgage to the said Birch, paid to the said Gormully the instalment of principal and interest which

accrued due on the said mortgage to the said Birch on the third day of December, A.D. 1877, as in the said declaration mentioned as follows: the said mortgage from the said Birch to the said Gormully then being in arrear and unpaid to an amount exceeding the amount claimed by the plaintiff, to wit, \$1,200.

Fifth plea: Upon equitable grounds, the defendant says that he purchased from one Richard Birch, certain lands in the province of Ontario, and the said Birch by deed made in pursuance of the Act respecting respecting short forms of conveyances, bearing date the said third day of December, A. D., 1874, conveyed the said land in fee simple to the said defendant in consideration of the sum of \$1,062.50, as in the said deed mentioned, the said lands then being subject to a certain incumbrance, by virtue of a certain indenture of mortgage theretofore made by the said Birch to one Joseph James Gormully, to secure the payment of the sum of \$1,500, as in the said mortgage to the said Gormully mentioned, and the said Birch in and by the said deed to the said defendant, agreed to pay off, satisfy and discharge the said mortgage to the said Gormully, and the said Birch in and by the said deed to the said defendant covenanted with the said defendant, in the form in the schedule in the said Act prescribed in the words following: "that he has the right to convey the said land to the said party of the second part, notwithstanding any act of the said party of the first part," and the said Birch thereby also further covenanted that he, the said Birch, would pay off and discharge and satisfy all interest then due or thereafter to become due upon the said mortgage, to the said Gormully, and truly save, defend and keep harmless and, indemnified the said defendant of, from and against the said mortgage, and of, from and against all action or actions, suit and suits, costs, charges, and expenses, in respect of the said mortgage, or in any way relating thereto," and the said defendant then paid to the said Birch the sum of \$250 on account of, and in part payment of, the purchase money of the said lands, and

then in pursuance of the contract of purchase, and as part of the same transaction, made to the said Birch, by deed bearing date the said third day of December, A. D. 1874, a mortgage upon the same lands so purchased by him as aforesaid, for securing the balance of the said purchase money, namely, \$812.50, which is the said deed in the said declaration mentioned, and the said covenant in the said declaration mentioned was made by the said defendant in consideration of the balance of purchase money then being due from the said Defendant to the said Birch, as aforesaid, and not for any other consideration whatsoever, and the said deed from the said Birch to the said Gormully, and the said deed from the said Birch to the said defendant, and the said deed from the said defendant to the said Birch were all of them duly registered in the proper registry office in that behalf, and the plaintiff had notice of all the said facts and circumstances before the assignment of the said covenant to the plaintiff as in the declaration alleged, and the said Birch did not pay off and discharge the said mortgage to the said Gormully, but therein made default, and did not pay the said principal sum secured by the said mortgage as aforesaid, which became due on the second day of November, A.D. 1877, nor the interest thereon, and the defendant was notified by the said Gormully that the said mortgage from the said Birch to the said Gormully was in default, and that the said Gormully intended to foreclose his said mortgage upon the said lands so purchased by the defendant as aforesaid, and to eject the defendant from the possession of the said lands, and the defendant thereupon, and in order to protect the land so purchased by him as aforesaid, and before any default had been made in the said mortgage to the said Birch, paid to the said Gormully the instalment of principal and interest, which accrued due on the said mortgage to the said Birch on the third day of December, A.D. 1877, as in the said declaration mentioned, the said mortgage from the said Gormully then being in arrear and unpaid to an amount exceeding the amount claimed by the plaintiff, to wit: \$1,200.

Fourth replication, on equitable grounds, to the fourth plea: that the defendant ought not be admitted to plead the said fourth plea, because the said deed of the defendant in the declaration mentioned was, and is a deed of mortgage, wherein the defendant is mortgagor, and the said Birch is mortgagee, and was made in pursuance of the Act respecting short forms of mortgages, and the defendant in and by the said deed covenanted to and with the said Birch, his heirs and assigns, in the words following, that is to say: "That the mortgagor has a good title, in fee simple, to the said lands, and that he has the right to convey the said lands to the said mortgagee, and that on default the mortgagee shall have quiet possession of the said lands, free from all incumbrances," whereupon the plaintiff prays judgment if the defendant ought to be admitted against his own acknowledgment, by his deed aforesaid, to plead the said fourth plea.

Seventh replication, on equitable grounds, to the fifth plea: that the defendant ought not to be admitted to plead the said fifth plea, because the said deed of the defendant in the declaration mentioned, was, and is a deed of mortgage, wherein the defendant is mortgagor, and the said Birch is mortgagee, and was made in pursuance of the Act respecting short forms of mortgages, and the defendant in and by the said deed covenanted to and with the said Birch, his heirs and assigns, in the words following: "that the mortgagor has a good title, in fee simple, to the said lands, and that he has the right to convey the said lands to the said mortgagee, and that on default the mortgagee shall have quiet possession of the said lands, free from all incumbrances," whereupon the plaintiff prays judgment if the defendant ought to be admitted against his own acknowledgment by his deed aforesaid, to plead the said fifth plea.

The plaintiff also demurred to the fourth and fifth pleas on the following grounds:—

1. There is no equity shewn to exist between the plaintiff and the defendant, such as to be a defence in this action.

The defendant demurred to the fourth and seventh replications on the following grounds :—

1. That the said replication is pleaded upon equitable grounds, but discloses no answer in equity to the defence set up by the fourth plea of the defendant.

Joinder.

The demurrers were argued together before *Harrison*, C. J. O., on the 25th June, 1878.

A. Cassels for the plaintiff.

H. J. Scott for the defendant.

On the 25th June, 1878, judgment was given for the defendant on the demurrer to the fourth and fifth pleas, and on the demurrers to the fourth and seventh replications.

From this decision the plaintiff appealed.

The case was argued on the 25th November, 1878 (*a*).

Beaty, Q. C., and *A. Cassels*, for the appellants. The respondent accepted his grantor's covenant to pay off the mortgage on the land sold to him, and the covenant in the mortgage sued on is an independent and distinct covenant, entirely free from any equity attaching to it to authorize a set off equitable or otherwise; and no such equity attaches to it in the hands of the assignee of the mortgage with or without notice of the deeds: *Tully v. Bradbury*, 8 Gr. 561; *Henderson v. Brown*, 18 Gr. 79; *Ryckman v. Canada Life Assurance Co.*, 17 Gr. 556; *Agra and Masterman's Bank*, L. R. 3 Ch. 291-397. But the respondent is estopped from setting up such a defence by his general and absolute covenant in the mortgage sued on for a good title and against all encumbrances. Moreover, at the time of the assignment of the mortgage to the appellant no equity existed against the plaintiff, as there was then no money due on the mortgage: *Watson v. Mid Wales R.W. Co.*, L. R. 2 C. P. 593. The fourth plea

(a) *Present*.—MOSS, C. J. A., BURTON, PATTERSON, and MORRISON, JJ. A.

does not show that the appellant had notice that it was purchase money. There is no allegation that this is a registered title; but registration of these instruments was not notice to the appellant, as he is not claiming an interest in land. They also cited: *Gilleland v. Wadsworth*, 1 App. R. 83; *Dart on Vendors and Purchasers*, 4th ed., 737; *Rawle on Covenants*, 4th ed., 447.

Robinson, Q. C., and *H. J. Scott*, for the respondent. This is really an appeal from *Henderson v. Brown*, 18 Gr. 79, as if that case is good law this judgment must stand. That decision shews that if there was no assignment an equity would exist; and we submit that the assignment makes no difference, and that the assignee of the mortgage takes it subject to all the equities affecting it in the hands of the mortgagee. *Smart v. McEwan*, 18 Gr. 623, shews that an assignee of a mortgage cannot set up the defence of a purchaser for value without notice: *Elliott v. McConnell*, 21 Gr. 276; R. S. O. ch. 93, sec. 8; *R. & J.'s Digest*, 2345. The Statute authorizing the assignment of choses in action was not intended to apply here. As to estoppel: *James v. McGibbney*, 24 U. C. R. 155. They cited *Willes v. Greenhill* 29 Beav. 376; *Moore v. Jervis*, 2 Coll. 60; *In re China Steamship Co.*, L. R. 7 Eq. 240; *Rawle on Covenants*, 4th ed., 548; *Heath v. Crealock*, L. R. 10 Ch. 22; *Walker v. Jones*, L. R. 1 P. C. 50; *Baskerville v. Otterson*, 20 Gr. 379; *Atkinson v. Gallagher*, 23 Gr. 201; *Dart on Vendors and Purchasers*, 5th ed., 804.

January 14th, 1879. (a) Moss, C. J. A.—The question we have to decide upon this appeal, is the same as that which engaged the attention of the Court of Chancery in *Tully v. Bradbury*, 8 Gr. 561, *Church Society v. McQueen*, 15 Gr. 281, and *Henderson v. Brown*, 18 Gr. 79. It is one which has been of much interest to the profession and has given rise to much diversity of opinion. It comes before us upon equitable pleadings in an action at law.

(a) *Present*.—Moss, C. J. A., BURTON, PATTERSON, and MORRISON, JJ. A.

The plaintiff is suing, as assignee for valuable consideration, upon a covenant for payment in a mortgage made by the defendant to the assignor, Birch. The defendant has pleaded that he purchased the mortgaged lands from Birch, who conveyed to him in fee simple by the ordinary short form of conveyance, in consideration of \$1,060.50 : that the lands were subject to a prior mortgage for \$1,500 : that Birch covenanted with the defendant that he had the right to convey, and that he would pay off and discharge all interest then due, or thereafter to become due, upon the prior mortgage, and defend and keep harmless and indemnified the defendant against that mortgage : that the defendant paid Birch \$250 on account of the purchase money, and then in pursuance of the contract of purchase and as part of the same transaction executed the mortgage in question, which is payable by instalments, and that all these documents were registered before the assignment to the plaintiff : that Birch made default in payment of the prior mortgage, and the defendant in order to protect his estate was compelled to pay to the prior mortgagee before any default had been made in the payment of the mortgage sued upon. There was a similar plea with the addition of an averment that the plaintiff had notice of all the facts and circumstances. Demurrers to these pleas having been overruled by the late Chief Justice of Ontario, sitting for the Court of Common Pleas, this appeal has been brought by the plaintiff.

I think it is quite clear that there is no room for the application of the ordinary doctrine of equitable set off. The payment to the prior mortgagee not having been made until after the assignment, did not form the subject of a set off against the assignee. Indeed this argument was but faintly urged at the bar. The defendant's contention was mainly rested upon two well-settled principles. The first is, that a purchaser is entitled to apply unpaid purchase money (even if secured) in the discharge of encumbrances, which are within the vendor's covenants ; and the other is, that an assignee of a mortgage takes it subject

to equities subsisting between the mortgagor and mortgagee—at least in relation to the amount payable upon the security. But when both these propositions are conceded, they fall short of establishing the defence. It follows from the first that while the mortgage is still held by the mortgagee, equity should allow the mortgagor a right of retainer out of his unpaid purchase money to the amount he has been compelled to pay the prior encumbrancer, instead of being driven to an action at law upon the covenant. This would be permitted, if upon no other ground, upon that of preventing inconvenient circuitry, as was explained by Esten, V. C., in *Tully v. Bradbury*, 8 Gr. 561. But that is a right growing out of the fact of payment, and not, it appears to me, incidental to the original contract itself. To say that the purchaser is entitled to this right of retainer by virtue of the contract merely, is to suppose an agreement that he may, notwithstanding an assignment, pay off the encumbrance and deduct the amount from his mortgage debt. It seems to me that there is no sound ground for making such a supposition; but that on the contrary, the circumstance that he takes an express covenant from the vendor for the discharge of this encumbrance, indicates that he was to rely upon it for his indemnity.

The eminent Judge, to whom I have just referred, lays down what I conceive to be the correct principle. He says in the case I have already cited, at p. 564: "Aware of the encumbrance, and intending that it shall be discharged by the vendor, he nevertheless grants a mortgage and covenant binding himself to pay the balance of the purchase money at stated times, and takes from the vendor a bond to discharge the encumbrance. This agreement indicates a clear intention to my mind that the balance of the purchase money should be paid irrespective of the prior encumbrance, and that no lien should exist upon it for the discharge of that encumbrance."

It does not appear to me that the question of notice to the assignee is material. He had notice, but of what? Of the existence of the prior encumbrance, of the purchase

by the defendant, of the absolute covenant for payment of the residue of the purchase money by instalments at times wholly different from those at which the prior encumbrance was payable, and of the covenant for indemnity taken by the purchaser. I do not think that from notice of these facts he should be held bound to infer that it was the intention of the parties that the vendee should, under all circumstances, have the right to apply his purchase money upon the outstanding encumbrance.

But both views of the whole question have been so fully treated in the opinion delivered by the learned Judges in *Henderson v. Brown*, 18 Gr. 79, that I can do no better than refer to the report of that decision. For my own part, I have simply to add that the best judgment I can form is, that the weight of reasoning is with Vice-Chancellor Strong, who differed from the majority of the Court, and I am content to subscribe my assent to the conclusion at which he arrived, and the reasons upon which he proceeded.

I think that the appeal should be allowed, with costs, and judgment entered for the plaintiff upon the demurrer.

BURTON, PATTERSON, and MORRISON, JJ.A., concurred.

Appeal allowed.

McARTHUR v. EGLESON.

Ejectment—Statute of Limitations—Estoppel.

The plaintiff left his wife and home more than thirty years ago, and went to the United States, where he remained until a short time before this action. He held no communication with his wife or friends while absent, and was, until his return, believed to be dead. Several years after his departure, his wife acting on this belief, married again and lived with her new husband Davidson, on plaintiff's farm. They both mortgaged the farm to a building society which sold it under a power of sale in the mortgage. On his return the plaintiff brought ejectment against the purchaser from the company.

Held, affirming the judgment of the Queen's Bench, 43 U. C. R. 406, that he was not estopped by his conduct from claiming the land, and that he was not barred by the Statute of Limitations, as the possession of his wife was his possession.

The second marriage was illegal, and the possession of Davidson along with the wife, was no more than if he was her bailiff, or working the farm with her on shares.

THIS was an appeal from the judgment of the Court of Queen's Bench discharging a rule *nisi* to set aside the verdict for the plaintiff, and to enter a nonsuit or verdict for the defendant, reported 43 U. C. R. 406.

The pleadings and facts are stated there, and in the judgment on this appeal.

The appeal was argued on the 26th November, 1878. (a)

C. Robinson, Q. C., (*G. Mackenzie* with him), for the appellants. The question for decision is, whether McArthur was put to his right of entry or action when Davidson went to live upon the land in 1853, as the husband of Christie McArthur. We contend that from the moment of such entry by Davidson, McArthur could have treated him as a trespasser, and that he was therefore put to his right of entry: *Doe. Cuthbertson v. McGillis*, 2 C. P. 146. Having allowed this state of things to exist for more than twenty years, he is now debarred from bringing this action. Another test is, could McArthur have brought an action more than twenty years ago without a demand of

(a) *Present*.—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

possession: *Doe. Jacob v. Phillips*, 10 Q. B. 130. An action was clearly rendered necessary by Davidson's entry in 1853, and could have been brought without any demand. The occupation of Davidson was not of such a character as would prevent the statute from running against McArthur. It was not a possession under McArthur, or in recognition of McArthur's title; on the contrary, it was entirely inconsistent with the recognition of any title in McArthur, or indeed of his existence. Nor was it a permissive occupation in any sense. Neither actually, for McArthur knew nothing of it, nor constructively through the wife, for she had at no time the power of ejecting Davidson. It is true that Davidson made statements at the trial tending to give the impression that he had never entertained any expectation of gaining a title to the land. As to this, it is to be first observed that Davidson, who was forcibly ejected by the Loan Company, was evidently a hostile witness. At the same time, it is clear from his own acts—such as paying the taxes, offering the land to Angus Campbell as security for his loan, &c.,—and his own statement, that if McArthur had returned while he was in possession, he would not have given up the land without being ejected—he was in fact occupying the land, assuming it to be his wife's—like any other husband. He did not set up any title against his wife, as his own wife; but he did claim to live there as against McArthur, and recognized no title in the woman *as the wife* of McArthur. However, under our present law, it is clear that the expectation or intention of the occupant, or his conception of the law, has nothing to do with the accruing of a title by possession. We deny that the possession of a husband's land by the wife must, under every state of circumstances, be in law the possession of the husband. If the woman had been living on the land, as the servant of Davidson, could it be said that the legal husband was still in possession by her? It is true that the possession of a wife could gain her no rights adverse to the legal husband, but her residence on the husband's lands does not necessarily prevent adverse

rights accruing to third parties. In the present case it cannot be contended that she was holding for the first husband or protecting his title, and her presence on the land did not prevent the necessity of an action on the part of McArthur to recover it. It has never been decided that in such a state of affairs as the present, and for the purpose of deciding such a question as the present, a husband and wife are one person. That fiction has been applied to certain cases for the purpose of doing equity. Here the equity is all with the defendant, and there is no necessity for applying a maxim which is in no sense in harmony with the facts. The rights of purchasers in good faith must be considered. Under the Quieting Titles Act the Court of Chancery would have barred the plaintiff of his claim. Although we are not called upon to say whose the land became at the end of twenty years from Davidson's entry, we submit that it was the land of Davidson. The statute began to run in his favour in 1853 against the legal owner, and at the end of the twenty years the law vested in him—whether he was aware of the fact or not—the title which had been McArthur's.

Rock, Q. C., and *Ferguson*, Q. C., for the respondent. There can be no question that the possession of the wife was the possession of the husband. The fact of Davidson's being on the land does not prove that the possession was his. His occupation could not be adverse to or give any possessory title as against the respondent's wife, and therefore could not be adverse to or give any possessory title as against the respondent: *Bright* on Husband and Wife, vol. ii., p. 12; *Bell* on Husband and Wife, p. 26; *Macqueen* on Husband and Wife, 143. If the respondent had returned before the end of seven years he could have turned out Davidson without any suit by merely calling on a constable. They cited *Johnson v. Baytrip*, 3 A. & E. 188; *Smith v. Lloyd*, 9 Ex. 562; *Shepherd v. Bayley*, 10 U. C. R. 310; *Pickard v. Sears*, 6 A. & E. 469; *Curr v. London, &c., R. W. Co.*, L. R. 10 C. P. 316.

January 14, 1879. (a) Moss, C. J. A., delivered the judgment of the Court.

Whatever difficulty there may be in this case does not arise in connection with the doctrine of estoppel. It seems to me that there is not even the shadow of ground for its application. All that the plaintiff did was to absent himself from home for nearly thirty years, without communicating with his wife or friends. As they probably credited him with the possession of some natural feelings, this conduct led them to suppose that he was dead. This inference, however natural, was mistaken. He did not hold himself out as a dead man, but he so conducted himself as to make it appear probable that he was no longer alive. It seems little short of absurd to contend, as must be done by an advocate for the application of the doctrine of estoppel, that he so conducted himself by his unusually extended and undisclosed sojourn in distant countries, as to represent that he was really dead, and that he intended that this representation might be acted upon by a person who desired to purchase his land, and that because some one had bought that land in that belief, he is estopped from asserting that he is still alive. The inapplicability of the doctrine to this case seems scarcely to have deserved the serious refutation it received in the Court below. In fact the only prejudice which the plaintiff could suffer from his absence was, that his title might be destroyed by the Statute of Limitations. Of this result he took the chance, and by its operation alone can he be punished by the loss of his land for his disregard of his domestic duties.

When the case is reduced to a consideration of the effect of the statute, it is clear that the only question is, whether the plaintiff was out of possession, and some other person in possession, for a sufficient length of time. From 1847, when he left the country, until 1853, when the ceremony of marriage was performed between his wife and Davidson, he was unquestionably in possession, for it is undisputed,

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and indeed indisputable, that the actual possession which his wife had during that period was equivalent to his personal possession. Upon the second marriage, so-called, Davidson came to reside with her upon the property. It is not easy to determine from the evidence what rights he supposed he acquired by his marriage. He seems to have been unable to free himself from the apprehension that the plaintiff might still appear upon the scene, and even upon the assumption of the plaintiff's death to have considered the land to be the property of his wife and her children. The late Chief Justice of the Queen's Bench, who tried the case without a jury, found that he never was in possession except for the plaintiff's wife, and under her. If then the question of Davidson's belief or intention were material, there is much ground for holding that he never deemed himself to be in actual and exclusive possession. But this question does not seem to be relevant. A man may not only believe, but know, that his possession is not adverse to that of the real owner until the last moment when the statutory period has run, and yet when that time has elapsed, his title may be perfect.

In this case the woman was always in the eye of the law the plaintiff's wife. The connection she formed with Davidson is wholly to be disregarded. The performance of the marriage ceremony gave no sanction to their future cohabitation. In point of law, therefore, when she brought him to reside with her upon this land, the case is precisely the same as if the ceremony had been omitted. Their belief in the plaintiff's death, and in their own conjugal union, is no factor in the problem. He was not dead, and thus they could not be lawfully married. It is here that the solution of the question is to be found. When he came to reside with her, the legal effect was precisely the same as if she had invited him without going through the ceremony of marriage, and in that case it could scarcely be held that the possession did not continue in her, or that the exclusion of the husband extended to his land; although they did suppose that they had become man and wife, he

had no marital rights which the law can recognize. He had, therefore, no higher position, than if he was her bailiff, or if he was working the farm with her on shares; in neither of which cases would the husband be deemed to be out of possession.

On this short ground we think that the verdict for the plaintiff should stand, and the appeal be dismissed with costs.

BURTON, PATTERSON, and MORRISON, JJ.A., concurred.

Appeal dismissed.

CROSSMAN V. SHEARS ET AL.

Partnership—Sale of chattel—Notice—Estoppel.

In 1867 the defendant S. entered into an agreement with the plaintiff for an advance of money to enable him to perform a stipulation in a lease made to him a short time before for the period of seven years by the Rossin House Hotel Company, that he would expend \$10,000 in providing furniture, &c., for the hotel. The agreement was as follows: "Said E. D. C. agrees to advance the money necessary to open the Rossin House in Toronto, not exceeding the sum of \$10,000, and G. P. S. to pay interest on one-half the amount till repaid to E. D. C., and each party to share equally in all profits, articles of furniture, supplies, &c., put in the said house, and E. D. C. to have a chattel mortgage on everything belonging to both parties, until the half of all the money advanced is repaid to E. D. C., signed, G. P. Shears." After the expiration of the term there were negotiations between the plaintiff and S. for a settlement, in the course of which the latter rendered statements to the plaintiff in which he assigned a value to the furniture and treated it as an asset belonging to them jointly. After these negotiations S. continued to carry on the business of the hotel without any dissent by the plaintiff, under a new lease which had been granted to him by the Hotel Company before the expiration of the original term. In 1875, S. becoming embarrassed, a new arrangement was concluded between him and the Company, by which he surrendered the old lease and obtained a new one for the term of ten years; and in consideration of an advance of money and arrears of rent, he executed a bill of sale to the Company of the furniture. The lease contained a stipulation that on certain conditions being performed the furniture should at the end of the term belong to S. Subsequently S. assigned the lease to one L., who had actual notice of the plaintiff's interest in the furniture. Evidence was given to prove that the Company had notice of the relation existing between S. and the plaintiff in reference to this furniture. There was no evidence to show that the plaintiff knew of this transaction until after it was consummated, when he promptly repudiated it.

Held, reversing the decree of BLAKE, V. C., that there being a partnership between plaintiff and S., and they being joint owners of the furniture, S. had no power to sell and convey the plaintiff's interest therein.

Held, also, that the plaintiff was not estopped by simply remaining passive from asserting his right to the furniture, and that he was entitled to a lien for any balance that might be due to him on the accounts being taken.

APPEAL from a decree of Blake, V.C.

This was a bill filed by the plaintiff against the defendant Shears for a partnership account.

The Vice Chancellor declared that there was a partnership between the plaintiff and Shears, but held that a sale which Shears made of the partnership chattels to the Rossin House Hotel Company, and the subsequent sale by the company to Irish, was sufficient to pass the property in these chattels as against the plaintiff, and to deprive

him of his right to a lien thereon for what might be found due to him on taking the partnership accounts.

The plaintiff appealed from this part of the decree.

The following is the judgment of

BLAKE, V. C.—The difficulty I felt in the case yesterday upon the view I took of the evidence, was, that it would be necessary for the Rossin House Company to shew what arrangement existed between Crossman and Shears; and I thought, from the production of the minute book, that there was enough to shew that there was an arrangement between Crossman and Shears sufficient to bind the Hotel Company in dealing with Shears, without the consent of Crossman to any arrangement that might have been made between them.

It is said that it is perfectly clear what that partnership was. I do not think that it is so perfectly clear. I think there was a *quasi* partnership, some arrangement between them. What that arrangement was we have only the two modes of arriving at. The first one is the paper produced signed by the defendant Shears, and the other from the plaintiff Crossman; and where the only two pieces of evidence we have do not agree as to the terms of partnership, it cannot be said that it is clear that there was a partnership and that it is clear what the terms of that partnership were.

In the paper produced there is not a word said about a share; there is nothing said about a share in the furniture to be put in the building by the Hotel Company. Mr. Crossman, in his evidence, denies both of these as terms of the partnership; in fact, without the introduction of the verbal evidence, it would be impossible to say from that piece of paper that there was any partnership. There was an arrangement by which an advance was to be made by Crossman and Shears, and this was to be secured; but I should come to the conclusion, upon the document of the 12th June, 1867, that there was not a partnership, that is, between Crossman and Shears. This fact has been established by the testimony of Mr. Crossman, which has not been answered by the statement of Shears, and as to which no other witnesses have spoken; and, therefore, I think I must conclude upon the evidence that there was an arrangement made, and that the result of that arrangement was, that Mr. Shears was to be the manager of this hotel,—that Mr. Shears was to be the active man,—that Mr. Shears was to be put forward as the owner and manager,—and that Mr. Crossman's name was not to appear. And in carrying out all that he did not, even from the beginning to the end, during the seven years of this arrangement, Mr. Cross-

man's name does not appear in any shape or form—not a bill has been rendered to Crossman and Shears, nor to Crossman for Shears—the name has not appeared in the register, the name has not appeared upon the minutes, the name has not appeared in any way, nor has it been disclosed to the public as being a partner in the establishment; so that, it is the case of a dormant, or secret, or *quasi* partner in an arrangement by which Crossman was to be kept entirely in the background, by which Shears was to have the power of transacting all the business of the firm, and apparently without even advising with Crossman upon the arrangements to be made in connection with the firm. There is some evidence to show that Crossman undertook a part of the arrangements of the hotel, although the evidence was unsatisfactory, as I have mentioned, when the witnesses were being examined—one person stating, because Crossman came into the office and hung up his coat in a familiar way, he understood there was a partnership; and another, because he complained of the whiskey, he understood there was a partnership; and a third, because he looked after the omnibuses, and so on; shewing how unsafe it would be for the Court to act upon the testimony of such people to establish a partnership. If such testimony were accepted to prove this relationship, it would be utterly impossible to say when there was a partnership, and when there was not. There was an intimate friendship between Crossman and Shears: there was a loan of money by Crossman to Shears; there was all that would make him take an interest in the affairs of the hotel; and everything that was done there could be traced to the interest of a friend, or of a person who has invested a considerable sum of money. I merely deal with this in endeavouring to arrive at the conclusion whether or not the Hotel Company was bound to conclude that there was an arrangement between Crossman and Shears of the character of a partnership so as to bind the Hotel Company, and thereby to prevent an arrangement, made between Shears and the Hotel Company, being treated as a concluded arrangement without the consent of Crossman to it.

Then there is an entry made in the minute book. This is explained by the two principal officers of the company—one the President, and the other the active man in the management of it on the part of the Hotel Company. Neither of these knew at the time that there was a partner, or knew that there was any partnership arrangement, but merely were aware of the fact that an advance of money had been made, and thoughtlessly entered in the book the fact that there was a partner; whereas the information given did not shew such to be the fact. The information simply shewed that a person had been found willing to advance the money. Upon this an entry was made in the book of the fact of Mr. Shears having a partner; and further, that “we being the lessors, will not pay any attention to the arrangement.” The

two officers say distinctly that they were not aware of the arrangement, but from the period of the giving of the lease, which preceded the entering of Mr. Crossman into the hotel, they dealt with Mr. Shears, and dealt with him alone; and the truth and accuracy of these two witnesses was not attempted to be impugned even in argument.

In 1873, another arrangement was made, another lease was given; and, although Crossman was aware of that, although he knew that Shears was dealing with the Hotel Company, although he knew that Shears was the person whose name was mentioned in the lease, although he knew that as between himself and Shears there was no voice in the control, there was nothing done by him as between the Hotel Company and himself to disclose the partnership.

We find that the officers never had a conversation with Crossman, and not one word passed between them, although they met weekly, if not oftener. I think that this is one of the strongest pieces of evidence to shew that Crossman did not desire to have his position treated as that of an ordinary partner, but that he did not want it to be known that a partnership existed between them; that he desired to be kept in the background; and he knowingly put Mr. Shears forward to transact the business, quite confident whatever he did was for the best, and prepared to accept the position in which Shears might place him. I think that a man who puts himself in such a position is bound to take whatever arrangement, or dealing, or transaction is the result of his own act; that he is bound to take that, and cannot be allowed to interfere with the rights which accrue to third parties by the position in which he has voluntarily placed himself. He might have claimed the right of being admitted as an open partner; and without discarding that right, he might have gone to the Hotel Company and given a notice that if they dealt with Shears they must take the consequences, as he was a partner; but he chose to place himself in that position, not only to the world generally, but to the Hotel Company; and if there is any injury arising from that position, it must be to the person who has chosen thus to place himself voluntarily rather than to those who ignorantly deal with one who is put forward as the sole partner.

Then comes the question whether, there being that arrangement, and Crossman, the undisclosed person interested in the dealing between himself and Shears, having terminated the arrangement, it was necessary to notify the company of it, or whether up to 1867 or 1874, Shears could bind Crossman by anything he chose to do—whether Shears, being the active partner when Crossman retired from the position of dormant or silent partner, or when this arrangement terminated, Shears lost the power he had up to that time of binding Crossman by what he did. I understand there is this

difference between an ordinary partner and a dormant partner, that the dormant partner may enter and retire, and it is not necessary that any notice should be given or taken of his movements, but that the business is allowed to continue unaffected, so far as the world is concerned, by the entrance or exit of the secret partner. When the dormant partner entered or left, no change was made in the partnership so far as the world was concerned, and only those were affected to whom distinct notice is proved of the knowledge of these partnership arrangements. The world could not take notice of one whose existence they were ignorant of so far as the partnership were concerned. The coming in or going out of Crossman until the knowledge is traced to them of the existence of his interest, in no way affects those dealing with the only disclosed partner. For his own benefit Crossman takes this peculiar position and interest, and he must take the consequences of the concealed or limited interest he assumes, and no outsider is affected by the position of this undisclosed partner, whether it be the formation or dissolution of the partnership; *quasi* partnership, or arrangement which may have been entered into. There has been no case cited which interferes with this view of the law, and a contrary opinion would, in this and many cases, work a great hardship. It is true that in some cases the Court will interfere in favour of the ostensible partner, not to the detriment of others, but where the ostensible partner is seeking to carry out a transaction which will be injurious to a dormant partner. Then, if the dormant partner applies to the Court, it will prevent the ostensible partner carrying out that which is being done in defiance of the position of the dormant partner. In such cases it is a preventable wrong, and an application to remedy something done.

But the Rossin House Company is unaware of these dealings between Crossman and Shears, and in good faith made the arrangement of 1873 and 1875, and alter their position and deal with Shears in a way in which Crossman intended they should deal; that is, as the managing man, who was entitled to make all arrangements, and to bind him in whatever he might do in the conduct of the business. It was immaterial whether Crossman secretly gave up that position or whether Shears continued to occupy the position in which Crossman placed him. He kept his interest undisclosed; and whatever the secret arrangement made might be, it cannot bind the Hotel Company, who all through have acted with the man who both agreed should represent them. That being so, I cannot say that this entry—entirely inaccurate—explained by the officers, was any notice to the Board of the Company of the position of Crossman, nor can I find on the evidence before me anything to make the Company now responsible to Crossman.

I do not see how I can deprive the Rossin House Company of

the benefit of the arrangement entered into with Shears, nor that I can take it from Mr. Irish, who has completed the bargain, unless distinct notice had been shown of the position of Crossman when the Company dealt with Shears.

I think the case, so far as the notice is concerned, fails.

I must dismiss the bill against Mr. Irish, with costs.

So far as the Hotel Company is concerned, I think as they allowed the memorandum in the minute book to remain there, it might have been the means of misleading Crossman, and so, in dismissing the bill against them, I will not dismiss it with costs.

So far as Shears is concerned, the plaintiff is entitled to have against him an ordinary partnership account.

The account sent to Crossman by Shears, throws light on the position which Shears thought he occupied with Crossman, and cannot be explained except upon the hypothesis of a partnership.

The case was argued on the 5th of September, 1878 (a).

C. Moss, (with him *J. T. Small*), for the appellant. The appellant and Shears were partners in the Rossin House until 1874. The plaintiff's statement on this point is uncontradicted, and is sustained by the partnership accounts furnished by Shears, and produced in evidence at the hearing. Although Shears attempted to deny the partnership in his answer, he was not examined on behalf of the defendants at the hearing. After the dissolution in 1874, Shears attempted to purchase the appellant's interest in the furniture in the Rossin House, but the appellant would not accept his terms, and on several occasions demanded a proper partnership account, and the winding up of the affairs of the partnership. Such being the case, any transaction between Shears and the Rossin House Company could only affect his own interest in the furniture, and could in no way affect the plaintiffs. The respective interest of the partners, must be ascertained by taking the partnership accounts, and the plaintiff is entitled to a lien on the whole partnership assets for all that is due to him: *West v. Skip*, 1 Ves. Sr. 239; *Skipp v. Harwood*, 2 Swanst, 586. Shears could only dispose of the partnership assets for the purpose of winding up the partnership

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concern, and not for his own private purpose: *Buckley v. Barber*, 6 Ex. 164; *Lindley* on Partnership, 3rd ed., 427; *Pollock* on Partnership, 70, 74. The defence of purchaser for value without notice is of no avail in the case of a sale of goods. See *Cundy v. Lindsay*, L. R. 3 App. 463; and *Benjamin* on Sales, 2nd ed., 5. But even if it were necessary to give notice, the appellant has shewn that the president and manager of the Rossin House Hotel Company had notice of his being a partner with Shears, and they recognized that relationship in their interference in the attempted arbitratration between Crossman and Shears, as clearly appears in the evidence and letters. The entry in the company's minute book for 1867, shews this plainly. There is a large balance admitted by Shears to be due the appellant; and the Rossin House Hotel Company and Irish, who now have possession of the furniture, must yield it up, or pay such balance to the appellant as may be found by the Court. The cases chiefly relied upon by the respondents are founded upon the principle of "apparent ownership." This principle depends entirely upon a part of the Law of Bankruptcy in England, which is not in force here. There was nothing in the appellant's conduct to estop him from now setting up this claim. His case is not that of a man standing by and with full notice and knowledge permitting the dealings between Shears and the company, which are now complained of. On the contrary, the evidence shews that he was entirely ignorant of those dealings until the transactions were concluded, and notified the parties as soon as he became aware of them: *Johnson v. Credit Lyonnais Co*, L. R. 3 C. P. D. 32.

Adam Crooks, Q. C., (*Kingstone* with him), for the respondents, the Rossin House Hotel Company. The evidence shows that there never was a partnership between the appellant and Shears. The appellant never was in visible or actual possession of any of the chattels in question, and these respondents, by virtue of the provisions of the Rev. Stat. Ont. ch. 119, "An Act respecting mortgages and sales of personal property," and of the like

Acts then in force, and by the fying thereunder the bills of sale from Shears to them, became entitled to the said chattels free from any title or claim of the appellant. If a partnership ever did exist, it expired on the 1st May, 1874, and Shears could then lawfully sell and give a good title to the chattels in question, and pass the whole legal property therein to these respondents; and thus the only right of the appellant is an account against Shears for the proceeds. The title so acquired by these respondents became and was a perfect title, which the appellant could not disturb at law. The appellant shows no claim in equity to the chattels in question against this legal title of the respondents. The appellant's remedy, if any, was one at law, and is not the subject of a suit in Chancery. The evidence shews acquiescence on the part of the appellant to the transfer of the chattels in question, and the respondents were purchasers in good faith of the said property, and acquired a valid title both in law and equity against the appellant. A settlement took place between Crossman and Shears at the time that Shears sent him the statement by the accountant Cape and paid him the \$5000, and by this settlement the property in the chattels in question was transferred to Shears. He cited *Knox v. Gye*, L. R. 5 H. L. 656; *Bolckow v. Foster*, 24 Grant 33; *Story* on Partnership, 6th ed., sec. 417; *Strathy v. Crooks*, 2 U. C. R. 51; *Addison* on Torts, (ed. 1878), sec. 480; *Morgan v. Marquis*, 9 Ex. 145; *Smith's* L. C. vol. 1, p. 14, vol. 2, 236; *McCalmont v. Rankin*, 2 DeG. M. & G. 403; *Ex parte Mackay*, L. R. 8 Chy. 643, 649; *Ex parte Conning*, L. R. 16, Eq. 414; *Lindley* on Partnership (3rd ed., 272, 686, 311, 1193, 1198; *Gow* on Partnership, 1184, 1191, 1193, 1197; *Collyer* on Partnership, 6th ed., sec. 889, and notes; *Ex parte Dorman*, L. R. 8 Ch. 51; *Reynolds v. Bowley*, L. R. 2 Q. B. 474; *Graham v. McCulloch*, L. R. 20 Eq. 397; *Rice v. Rice*, 2 Drew. 77; *Seton* on Decrees, 1157; *Chappell v. Purday*, 2 Phil. 229; *Corporation of Rochester v. Lee*, 2 DeG. M. & G. 427; *Hope v. Carnegie*, L. R. 4, Ch. 264.

Morphy, (with him *Winchester*), for the respondent Irish.

Whatever order the Court makes, the interests of the respondent Irish should be protected, as he acted in good faith and was a *bona fide* purchaser without notice.

Howell for respondent Turner.

January 14, 1879 (*a*). Moss, C. J. A.—The decree pronounced by the learned Vice-Chancellor in this case accords so thoroughly with our impression of what was probably just and fair between the parties, that it is with great reluctance we have come to a different conclusion. The question which lies at the threshold of the controversy is, whether a partnership was proved to exist between the plaintiff and the defendant Shears. The latter was a party to the record, as amended, but having become insolvent, his assignee was substituted as a defendant. He had, however, previously filed an answer, and at the hearing he was added as a party defendant. He pleaded that in June, 1867, he entered into an agreement with the plaintiff for an advance of money necessary to enable him to perform a stipulation in a lease made to him by the defendants, the Rossin House Hotel Co., that he would expend the sum of \$10,000 in providing furniture, utensils, and other articles requisite for the equipment of a first class hotel. As evidence of this agreement he signed a document of a very loose and unartificial character, of which the following is a copy :—

“Memorandum of agreement between Ed. Crossman, Esq., of Philadelphia, and G. P. Shears, of Toronto, Canada :

“Said E. D. C. agrees to advance the money necessary to open the Rossin House in Toronto (not exceeding the sum of ten thousand dollars), and *G. P. S. to pay interest on one half the amount till repaid to E. D. C., and each party to share equally in all profits, articles of furniture, supplies, &c., put in the said House, and E. D. C. to have chattel mortgage on everything belonging to both parties, until the half of all the money advanced is repaid to said E. D. C.*

(Signed) G. P. SHEARS.”

Toronto, June 12, 1867.

(*a*) *Present*—MOSS, C. J. A., BURTON, PATTERSON, and MORRISON, JJ. A.
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He alleges that in pursuance of this agreement the plaintiff advanced a portion, but not the whole of the moneys agreed; that for several years after the opening of the hotel the plaintiff boarded and resided in it, but took no part in the management, and drew from the receipts large sums, assuming the right to do so under the agreement; that during the whole of the term of seven years the plaintiff never assumed any responsibility for the conduct of the business, or any liability on account of it, but sought only to draw as much as he could under the provisions of the agreement; and that the plaintiff, under the agreement, had no right to claim any joint ownership or right of possession of the furniture or other chattels in the hotel. He further submitted that upon the true construction of the agreement the plaintiff was not in any sense a partner, but was only entitled to a return of his money advanced, with reasonable compensation for its use. The other defendants also contest the existence of the partnership. It appears that shortly before the arrangement between the plaintiff and Shears the Hotel Company had demised their premises to the latter for the term of seven years, to expire on the 1st July, 1874, and that the lease contained a covenant on their part to expend \$25,000 in the purchase of furniture to be placed in the hotel, and an agreement that if the lessee fulfilled the conditions of the lease this furniture should become his property at the end of the term. If we were left to gather the real nature of the agreement from the vague terms of the memorandum, the task might be one of some difficulty, but the conduct of the parties has supplied a guide to its interpretation. After the expiration of the term there were negotiations for a settlement, in the course of which Shears rendered statements to the plaintiff unequivocally recognizing his right to one half of the furniture in the hotel. In these he assigns a value to the furniture, and treats it as an asset belonging to them jointly.

The Vice-Chancellor pointedly observes: "So far as

Shears is concerned, the plaintiff is entitled to have against him an ordinary partnership account. The account sent to Crossman by Shears, throws light on the position which Shears thought he occupied with Crossman, and cannot be explained except upon the hypothesis of a partnership." With this view we entirely agree; but the Vice-Chancellor, while according this position to the plaintiff, has held that the sale which Shears made to the Hotel Company, and the subsequent sale by the company to the defendant Irish, were sufficient to pass the property in the furniture as against the plaintiff, and to divest him of any lien for the balance that may be found due against him upon taking the partnership accounts. This is the part of the decree, to which exception has been taken by the appellant, and which alone has occasioned us serious difficulty. It is shewn that after the negotiations already referred to, Shears continued to carry on the business of the hotel without any dissent being expressed by the plaintiff under a new lease which had been granted to him by the company before the expiration of the original term.

In October, 1875, Shears being embarrassed, and requiring, as he represented, a sum of \$6000 to discharge his liabilities, an arrangement was concluded between him and the company by which he surrendered the existing lease, and accepted a new one for a term of ten years, and in consideration of an advance of the required sum of money, and of arrears of rent which he owed, and of the surrender and new lease, he executed a bill of sale to the company of the furniture. There was much discussion at the bar, upon the question whether the company should be deemed to have had notice of the partnership at the time this arrangement was made. In the minutes of the company an entry is found that at a meeting of directors held on July 19th, 1867, the president having mentioned that he had been informed that Mr. Shears had taken a partner into his business of hotel-keeping, the board decided not to take any notice of Mr. Shears's partner, but deal with Mr. Shears alone. It was also pointed out that the president

stated that he had heard that Shears had found a partner, a gentleman in Philadelphia, who was to advance the money, and that he was to give him an interest in the hotel, and that some time afterwards he learned from Shears that the plaintiff was the person who had made the advance. It is further urged that before completing the transaction of October, 1875, the president enquired of Shears "whether any person had any claim whatever on the furniture," when he received a solemn assurance to the contrary. Hence it is argued that the president had some reason to suppose that the plaintiff was a partner, and that as he relied upon the assurance of Shears instead of making enquiries of the plaintiff, the company should be affected with notice. These considerations are certainly of great weight, but in the view that we take of the case it is unnecessary to express any opinion upon the question of notice. With regard to the materiality of notice, we are obliged to differ from the learned Vice-Chancellor. Having found as a fact that notice to the company was not established, he was of opinion that the plaintiff's case against the company and against Irish failed. He observed: "I do not see how I can deprive the Rossin House Company of the benefit of the arrangement entered into with Shears, nor that I can take it from Mr. Irish, who has completed the bargain, unless distinct notice had been shewn of the fact of the position of Crossman, when the company dealt with Shears."

It may be observed that there is no dispute that Mr. Irish cannot stand in any higher position than the company, because he had express and distinct notice of the plaintiff's claim before he completed his bargain or received the transfer, and an indemnity from the company.

But although the learned Judge, in the passage we have cited from his judgment, appears to rest his judgment upon the want of notice to the company, we apprehend that this must be read in connection with the views he expressed of the manner in which Crossman had acted himself, and of the effect this had upon his right. These views will be

best understood by referring to his own language. He said: "In 1873 another arrangement was made, another lease was given; and, although Crossman was aware of that, although he knew that Shears was dealing with the Hotel Company, although he knew that Shears was the person whose name was mentioned in the lease, although he knew that as between himself and Shears there was no voice in the control, there was nothing done by him as between the Hotel Company and himself to disclose the partnership. We find that the officers never had a conversation with Crossman, and not one word passed between them, although they met weekly, if not oftener. I think that this is one of the strongest pieces of evidence to shew that Crossman did not desire to have his position treated as that of an ordinary partner, but that he did not want it to be known that a partnership existed between them; that he desired to be kept in the background; and he knowingly put Mr. Shears forward to transact the business, quite confident whatever he did was for the best, and prepared to accept the position in which Shears might place him. I think that a man who puts himself in such a position is bound to take whatever arrangement, or dealing or transaction is the result of his own act; that he is bound to take that, and cannot be allowed to interfere with the rights which accrue to third parties by the position in which he has voluntarily placed himself. He might have claimed the right of being admitted as an open partner; and without discarding that right, he might have gone to the Hotel Company and given a notice that if they dealt with Shears they must take the consequences, as he was a partner; but he chose to place himself in that position, not only to the world generally, but to the Hotel Company; and if there is any injury arising from that position, it must be to the person who has chosen thus to place himself voluntarily rather than to those who ignorantly deal with one who is put forward as the sole partner."

. Now we gather from this language that the Vice-Chan-

cellor did not intend to give any countenance to the notion that the purchaser of a chattel can fortify his title because he had no notice of the infirmity of title of his vendor.

The familiar doctrine on this subject has recently been restated by very high authority. In *Cundy v. Lindsay*, R. L 3 App. Cases, 463, Lord Cairns, C., said : " Now with regard to the title to personal property, the settled and well known rules of law may, I take it, be thus expressed : by the law of our country the purchaser of a chattel takes the chattel, as a general rule, subject to what may turn out to be certain infirmities in the title. If he purchases the chattel in market overt, he obtains a title which is good against all the world ; but if he does not purchase the chattel in market overt, and if it turns out that the chattel has been found by the person who professed to sell it, the purchaser will not obtain a title good as against the real owner. If it turns out that the chattel has been stolen by the person who has professed to sell it, the purchaser will not obtain a title. If it turns out that the chattel has come into the hands of the person who professed to sell it, by a *de facto* contract, that is to say, a contract which has purported to pass the property to him from the owner of the property, there the purchaser will obtain a good title, even although afterwards it should appear that there were circumstances connected with that contract, which would enable the original owner of the goods to rescind it and to set it aside, because these circumstances so enabling the original owner of the goods, or of the chattel, to rescind the contract and to set it aside, will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained unrescinded." In this country a purchaser is still more in danger of suffering from infirmities in his vendor's title, because there is no market overt. Although a purchaser of chattels may have acted in perfect innocence and with reasonable prudence, he is without protection against a real owner, who has done nothing to forfeit his title.

There was a good deal of comment at the bar upon

cases in which title was conferred through a reputed owner, or by a person in actual, exclusive possession with the consent of the true owner. *Horne v. Baker*, 2 Smith L. C. 236; *Ex parte Dorman*; *Graham v. McCulloch*, and similar decisions were cited. But there are two reasons which render these wholly inapplicable. They proceed altogether upon the operation of the provisions in bankruptcy law, commonly called the order and disposition clauses, which have no counterpart in our legislation. And, moreover, the question here does not arise upon the insolvency of the partner in whose possession the property was allowed to remain. Even if the principles established by these cases had a place in our jurisprudence, the decision in *Reynolds v. Bowley*, L. R. 2 Q. B. 474, shows that they would not extend to this case. It was there held that where there is a partnership with an ostensible partner and a dormant partner, on the bankruptcy of the former the interest of the latter in the property of the partnership does not pass to the assignee of the bankrupt.

The argument, that because the sale was made after the dissolution of the partnership, it was within the authority of Shears, is not sustainable either upon principle or authority. The question of notice being excluded, as immaterial, or it being found that the Company had notice, the case is that one of two partners, a considerable time after the dissolution, assumes to sell the partnership estate for his own purposes, and partly at least to satisfy a private debt due to the purchaser. We cannot conceive it possible that a purchaser who chose to deal in this manner, without any communication with the other partner, can destroy the rights or defeat the interest of the latter. Under such circumstances, he takes no more than the interest of the single partner. The case of *Morgan v. Marquis*, 9 Ex. 145. on which much reliance was placed by the defendants, is quite in conformity with this view.

It really does no more than establish that where one tenant in common assumes to sell the joint property, an action at law will not lie against the purchaser, because he

steps into the position of his vendor as a co-tenant, and one tenant in common cannot maintain an action against his companion, unless there has been a destruction of the particular chattel, or something equivalent to it. But so far was the Court from intimating that such a sale would cut out the interest of the co-tenant, that it was expressly said that the matter must be settled by an account between the parties in the Court of Bankruptcy, or in a Court of Equity.

We seem then to have arrived at this result, that if by reason of their partnership, the plaintiff and Shears were joint owners of this property at the time of the sale to the Hotel Company, the plaintiff's interest was not divested by the want of notice to the company, or by the continued possession or reputed ownership of Shears, or by the exercise of any authority conferred upon him by the general law relating to partnership.

The next question is, whether the plaintiff has so conducted himself that he should now be estopped on the principle established by *Pickard v. Sears*, 6 A. & E. 469; *Freeman v. Cook*, 2 Ex. 654, and similar cases. In the very recent case of *Johnson v. The Canada Loan Co.*, 3 C. P. D. 32, Lord Chief Justice Cockburn, sitting in the Court of Appeal, used language which could scarcely be more in point, or more decisively against this contention. He said: "In all the cases decided on this principle, in order that a party shall be estopped from denying his assent to an act prejudicial to his rights, and which he might have resisted, but has suffered to be done, it is essential that knowledge of the thing done shall be brought home to him. * * * It would be to carry this doctrine much too far to apply it where advantage has been taken of a man's remissness in looking after his own interests to invade or encroach upon his rights, in the absence of knowledge on his part of the thing done, from which his assent to it could reasonably be implied."

Here there is a total absence of evidence that the plaintiff knew of the transaction between the defendants until after

it had been consummated, and he seems to have promptly repudiated it, when he became aware of its existence. All he did was to leave the furniture in the possession of his co-tenant pending an adjustment of their accounts. In the words of the Chief Justice in the case lastly cited, he simply remained passive. It was asked in argument whether a dormant partner in a mercantile house, who left the stock on the premises, after his retirement from the firm, could dispute the absolute title of a person who purchased from the continuing partner. We presume that he could not do so, because he must be presumed to have given a license for the continuance of the business in the same way as before, and an authority to make sales in the usual course of such business. That would be the irresistible inference from the bare circumstance of his allowing his companion to remain in possession and use the goods of the firm for the purposes of his business. So in this case, if Shears sold a customer a bottle of wine, it would be preposterous to contend that the plaintiff could make any claim against the purchase. From his suffering Shears to remain in possession, a license should be presumed for the use of the chattels in the business, but that sufferance does not lead to the inference that he gave authority to sell and absolutely dispose of the furniture in question. That principle is abundantly illustrated by the cases in all our Courts, such as *Rice v. Stevenson*, 24 C. P. 245, and *Nordheimer v. Robinson*, 2 App. R. 305, where effect has been given to hire and sale receipts as against an innocent purchaser for value.

But Mr. Crooks, in his very able argument, relied principally upon the proposition that there was abundant evidence to show that after the expiration of the term there was an agreement between the plaintiff and Shears, by which the assets were divided, and this furniture was to become the absolute property of Shears. There is no doubt that upon a dissolution, partnership property may be converted into the separate property of one of the purchasers by a mere agreement to that effect without a deed or any special formality; but it is equally clear that

the agreement must be a concluded and executed, not merely an executory one. So long as the agreement is dependant on an unperformed condition, so long will the ownership of the property remain unchanged. The cases are cited and commented upon by Sir N. Lindley in his treatise on Partnership, 4th ed., at page 648. The question, therefore, is whether the defendants have proved an executed and concluded agreement, by which the furniture was to become the separate property of Shears. It must be assumed, we think, that the learned Vice-Chancellor did not arrive at this conclusion. If he had done so, it would have been a simple and obvious mode of disposing of the case, and it would have been unnecessary to consider the question of notice, or the special characteristics of the partnership relation between the plaintiff and Shears. He would never have founded his judgment upon the absence of notice, and upon the manner in which the plaintiff had allowed the world to believe that the business had belonged to Shears alone, if he had been able to determine, as a matter of fact, that, whatever might have been their previous relations, there was after the dissolution a concluded agreement making Shears the separate owner of this property. The opinion we have formed is, that such an agreement is not proved. For some unexplained reason Shears was not made a witness in the case. The necessary inference is, that he was unable to contradict the plaintiff. Indeed, this is suggested by his answer, which is so far from setting up such an agreement, that its whole tenor seems inconsistent with any agreement of the kind having been made. The sole testimony on the point is that of the plaintiff, who denies in the most positive manner the existence of any such agreement. He admits that there were negotiations for a settlement, and that the statements or accounts already mentioned, were sent to him by Shears. In one of these a balance is struck in his favour for \$5,876.03, for which amount Shears sent him a chattel mortgage upon the furniture. According to the plaintiff he did not accept the mortgage, and it was never

registered. His reason was that he was dissatisfied with the account rendered. He did, however, receive a sum of \$5,000 on account, and realized some assets belonging to the partnership, which would have gone to him if there had been a final settlement on the basis proposed by Shears. But these circumstances are not inconsistent with his statement, and cannot outweigh his express denial that there was any concluded agreement. He naturally took as much money and realized as much assets as he could; but if the agreement had been finally made, no reason can be suggested why he should not have accepted and filed the chattel mortgage. In the face of his denial, and in the absence of any statement by Shears, we do not feel warranted in drawing the conclusion that there was an agreement.

We think, therefore, that the appeal must be allowed with costs, and that the decree should declare the plaintiff entitled to a lien upon the furniture in question for any balance that may be found due to him upon the taking of the accounts. The costs in the Court below must be reserved, because it may turn out that little or nothing is due to the plaintiff.

BURTON, PATTERSON, and MORRISON, JJ. A., concurred.

Appeal allowed.

LUCAS V. CORPORATION OF THE TOWNSHIP OF MOORE.

Highway—Want of repair—Misdirection—36 Vic. ch. 48, sec. 409.

The plaintiff's husband lost his life by falling with his horse and sleigh into a ditch or drain, alongside of a highway in the township of Moore, on which deceased was driving at night. The ditch was about 12 feet deep and 32 feet wide extending about half way into the travelled road which was thus reduced to 30 feet in width. The road had been in this state for some years, but it appeared to serve the purpose of the neighbourhood as a highway. There was no railing or other guard at the ditch, and nothing to indicate the situation on a dark night, such as the night in question was. It was alleged that the deceased was under the influence of liquor; but there was no direct evidence as to how he fell into the ditch.

The learned Judge, at the trial, told the jury that if the defendants were indicted for having the road in the position described they would be directed to find them guilty of having the road out of repair. He also told them that where a ditch became such a deep and dangerous place as this, the corporation were bound to put a guard on it, otherwise as a matter of law they were guilty of neglect in not guarding it, but he proceeded to say: "It is a matter entirely for you. Was that road in such a reasonable state of repair that it was safe for persons passing and re-passing at all times night and day? If so, you will find a verdict for the defendants."

Held, reversing the judgment of the Queen's Bench, 43 U. C. R. 334, that the remarks above referred to were more than a strong comment on the evidence, and that there was clearly misdirection, as it was impossible to say as a matter of law that the statutory duty to keep the road in repair had been neglected by the existence and continuance of the ditch or by its being without a guard; that being a deduction of fact to be made by a jury upon a consideration of all the circumstances.

Held, also, that the obligation expressed by the words "keep in repair," as used in 36 Vic. ch. 48, sec. 409, O., is satisfied by keeping the road in such a state of repair as is reasonably safe and sufficient for the requirements of the particular locality; and that there was non-direction in the attention of the jury not being called to the duty of modifying the force of the word "repair" by reference to the surrounding conditions.

This was an appeal from a judgment of the Queen's Bench discharging a rule *nisi* to set aside the verdict, and enter a nonsuit, or for a new trial, reported 43 U. C. R. 334. The pleadings and facts are fully stated there, and in the judgments on this appeal.

The appeal was argued on the 14th November, 1878 (*a*).

Robinson, Q. C., and *Ferguson*, Q. C., for the appellants. The question for decision here is one of great importance, as the finding of the Court below will, if maintained,

(*a*) *Present*.—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

impose a heavy burden on the township. Large drainage works have been constructed, and are in progress in this and the adjoining counties. There are many miles of similar drains unprotected as this was, and many places quite as narrow and dangerous. The liability to protect all such drains by a railing or parapet, would very materially increase the cost, and such protection would require constant care to maintain. It was peculiarly a case which should have been left to the jury unbiassed by a strong charge either one way or the other; but the learned Judge laid down the law in such a way as to make it impossible for the jury to find in favour of the appellants, and they were practically deprived of the privilege of a trial by jury: *Firemen's Ins. Co. v. Walden*, 12 Johns. 519. If the Court should be of opinion that there could only have been one verdict, viz., that actually found, we are not entitled to relief, but we submit that even if the charge was unobjectionable the verdict was not warranted by the evidence: *Regina v. Port Perry, &c., R. W. Co.*, 38 U. C. R. 431; *White v. Crawford*, 2 C. P. 352. The evidence did not shew that the highway was out of repair within the meaning of the statute, as it appeared there was a good road at the place in question of sufficient width for the purposes of all public travel. There was no law requiring the corporation to guard the ditch; it was for the jury to say whether a fence was necessary, and they should have been told that it was merely the duty of the corporation to keep the road in a reasonable state of repair having regard to the circumstances and the requirements of the locality. Contributory negligence was proved, as the evidence shewed that James Lucas was intoxicated when at Moreton and unfit to drive, but this evidence was left unfairly to the jury as the learned Judge told them that the fact that Lucas was drunk at the time of the accident made no difference whatever. They referred to *Giles v. Great Western R. W. Co.* 36 U. C. R. 360; *Jackson v. Metropolitan R. W. Co.*, L. R. 3 App. Cas. 193; *Bridges v. North London R. W. Co.*, L.

R. 7 H. L. 213; *Jewell v. Parr*, 13 C. B. 916; *McGunigal v. Grand Trunk R. W. Co.*, 33 U. C. R. 194; *Winckler v. Great Western R. W. Co.*, 18 C. P. 250; *Boyle et al. v. Corporation of Dundas*, 25 C. P. 420; *O'Connor v. Townships of Otonabee and Douro*, 35 U. C. R. 73, 88; *Graham & Waterman*, vol. 1 p. 210, 2nd ed.; *Hilliard on New Trial*, 2nd ed., 783, 784, 314.

Bethune, Q. C., for the respondents. The evidence proved that the road was a most dangerous place, and the appellants were clearly guilty of negligence, as the Legislature undoubtedly intended such places to be fenced: *Toms v. Corporation of Whitby*, 35 U. C. R. 210, 37 U. C. R. 100; *Gilchrist v. Corporation of Carden*, 26 C. P. 1; *Caswell v. St. Mary's Road Co.*, 28 U. C. R. 247. The verdict was correct, and the charge a proper one. It is true that the learned Judge expressed a strong opinion as to the liability of the defendants, as he had a right to do, but he distinctly told them that it was for them to say whether the road was or was not in a reasonable state of repair. The question of contributory negligence was left to the jury, and their verdict should not be disturbed. He cited *Jackson v. Metropolitan R. W. Co.*, L. R. 3 App. Cas. 193; *Bridges v. North London R. W. Co.*, L. R. 7 H. L. 213; *Wharton on Negligence*, 421, 422; *Shearman & Redfield on Negligence*, 3rd ed., 369; R. S. O. c. 174, secs. 491, 509.

January 14, 1879. (a). PATTERSON, J. A.—This is an action brought by the widow, who is also the administratrix of James Lucas, who lost his life by falling, with his horse and sleigh, into a ditch or drain which occupied part of an allowance for road in the township of Moore, along which the deceased was driving, on the night of 6th December, 1877.

The charge against the defendants is, that they were

(a) *Present*.—MOSS, C. J. A., BURTON, PATTERSON, and MORRISON, JJ. A.

guilty of a breach or neglect of the duty which is cast upon them by the Municipal Act, R. S. O., c. 174, to keep the highways in repair, by permitting the ditch to be in the highway, or by neglecting to fence it or otherwise protect the public against the danger of falling into it.

The case was tried before Mr. Justice Armour and a jury, at the Spring Assizes, in 1878, at Sarnia, when a verdict was rendered for the plaintiff for \$2,500, distributed among the widow and children of the deceased.

In the following term a rule *nisi* for a new trial was obtained on the grounds, amongst others, of misdirection and non-direction; and the Court of Queen's Bench, consisting of the late Chief Justice of that Court and of Mr. Justice Armour, having discharged the rule, the defendants have appealed to this Court.

We have been furnished with a very full report from the short-hand writer's notes of the charge to the jury which is the subject of complaint. This report was also before the Court below; and it appears that one passage of the charge which has been pressed upon our attention, was one of those particularly insisted on below as having been calculated to give the jury an erroneous idea of the law. The learned Chief Justice said (43 U. C. R. 349): "The misdirection complained of here is, that the learned Judge told the jury that the defendants were liable to be indicted, and were responsible in damages for having the ditch in the place where it was, and as it was shewn to be. The learned Judge, according to the very full report of his charge made by the short-hand reporter, does appear to have made this observation; but it must be taken, we consider, with the many other observations which he made to the jury in the course of the same charge. Immediately after making it he told the jury that the question of repair or nonrepair was a matter entirely for their consideration, regardless of his opinion. Nothing whatever was withdrawn from their consideration. Nothing was intended by the learned Judge to have been withdrawn from their consideration. The observation, when taken in connection

with the remainder of his charge, is really no more than a strong observation on the evidence, and one which, I am bound to say, is fully warranted by the evidence. The verdict ought not to be set aside on this ground."

The effect of these portions of the charge to which reference is made in this passage will appear better by reading the exact words from the reporter's notes. They are as follows :

"Now, it is said that this road cannot be out of repair, because there is thirty feet of good road upon it. I suppose a person could travel on six feet with a double waggon ; and if the other sixty feet were turned into a gulley, I suppose it would be argued strongly to you that the road was in good repair because of the six feet. Now, is that a sensible view to take of it ? The whole of sixty-six feet belongs to the public, and they are entitled to have every inch of it in reasonable repair if the public require it. As a matter of law, no one has a right to take possession of any part of the public road, or to obstruct it in any manner whatever ; and the public are entitled to have it kept in repair to its fullest extent if it is required for public use. It becomes necessary to look at what is reasonable. How much of the road is it reasonable to keep in repair ? That depends upon many circumstances. In a new township, when a road is first cut out, probably twelve or fifteen feet would be reasonable. The circumstances and requirements of the people in reference to a public highway are to be taken into consideration. When the township becomes a longer time settled, and more people live in it, then the public requirements are greater, and the road is made to suit the public requirements, and improvements are made to such an extent as is necessary to accommodate the travelling public. If there were thirty feet laid out in the middle of the road, it would not be reasonable for a man to choose to travel off that, and break his back, and then bring an action against the corporation, because he would have plenty of room on the middle of the road for ordinary use. In some cases it may be necessary to lay out the whole width of the road, as in towns and villages. Now, you will observe that the ditch in question is not an ordinary ditch thrown up at the side of the road for the purposes of the road ; it is not that at all. If it had been of that character, and this man had driven into it, the proba-

bility is, that he would not have hurt himself to any great extent. But this ditch was dug by the council to take water off the neighbouring lands, and received a large quantity of water at different times, sometimes as much as a depth of seven feet; the effect of which was to wear away the sides and bottom of the ditch, and to create what is ordinarily called a gully or ravine, taking away from year to year a very large portion of the travelled road, driving the travel to the other side of the road, as portions continued to fall in. Can you call that a reasonable state of repair for a road to be in? If the corporation were indicted for having the road in that position, there can be no doubt that a jury would be directed to find them guilty of having the road out of repair. It is dangerous to the lives of persons passing and repassing on the road, persons who have a right to pass and repass at all times, day and night. This is not like a case where by a sudden freshet part of the road is carried away, and where a reasonable time would be allowed to repair the injury so caused. This place has existed some fourteen or fifteen years, the ravine getting wider and deeper and more dangerous from year to year. It does seem to me that if this corporation had been willing to expend half the money they are expending in the defence of this suit in fencing this dangerous place, it would have been a far better thing to do. That it is dangerous, no person can deny; and it strikes your common sense as being a dangerous place. They say it is only dangerous when you get into it. Very likely; but corporations are not to keep dangerous places on public highways where people may get into them; that is not a proper repair of the highway. Where a ditch becomes such a deep and dangerous place as this, the corporation are bound to put a guard on it; otherwise, as a matter of law, they are guilty of neglect in not guarding it. I declined to withdraw the case from you on the ground of there being no evidence to shew want of repair, not because I was going to rule to you that this road was out of repair, but because I thought there was ample evidence to go to you as twelve reasonable men that the road was out of repair. It is a matter for you entirely. Was that road in such a reasonable state of repair that it was safe for persons passing and repassing at all times, night and day? If so, then you will find a verdict for defendants."

The duty of the municipal corporation with respect to the road is imposed by the Municipal Act. The Act in

force when the accident happened, was 36 Vict. c. 48, O., the 409th section of which enacted that "Every public road, street, bridge and highway shall be kept in repair by the corporation." It is now well-settled by decisions in our own Courts as well as in the New England States and in the State of New York upon statutes framed in similar terms, that the obligation expressed by the general phrase, "keep in repair"—a phrase which is applied equally to an allowance for road in a newly-surveyed and organized township, and to a crowded street in the business part of a city—is satisfied by keeping the road in such a state as is reasonably safe and sufficient for the requirements of the particular locality, and that in deciding whether any municipal council is chargeable with default, regard must be had to such considerations as the means at the command of the council, and the nature of the ordinary traffic of the locality.

This was a good deal discussed, and some of the decisions on the subject were referred to in *Toms v. Corporation of Whitby*, 35 U. C. R., 210, 37 U. C. R. 100.

The liability of a corporation, whether to answer in damages or to be convicted of a misdemeanour, for suffering a highway to be in an impassable or dangerous condition, arises not merely because the road is impassable or dangerous, for that state of things may exist without blame to the corporation, but because there has been neglect of the duty to keep the road in such a state of repair as is reasonably safe and sufficient for the ordinary travel of the locality.

In this case there was a roadway of about thirty feet wide which does not appear to have been unfit for travel, and which does appear to have served the purpose of the neighbourhood as a highway. The rest of the allowance for road was occupied by the ditch, which was undoubtedly a source of danger to travellers who did not take care to keep on the roadway, but was not necessarily dangerous to those who knew the place and were reasonably careful. It may have been wrong to allow the ditch

to remain open and unguarded by a fence, or it may have been unreasonable to require the council to fill it up or to fence it. In some circumstances the very existence of such a break in the soil of the statutory highway might have imported default on the part of the council. In others, and this may perhaps be a case of the kind, it may have been essential to the construction of a practicable road to drain it by a work like this. It is impossible to say, as a matter of law, that by reason of the existence or continuance of the ditch, the statutory duty to repair had been neglected. That is a deduction of fact to be made by a jury upon a consideration of all the circumstances, and with a correct apprehension of the limits of the statutory duty to "keep in repair."

It appears to us that the jury, hearing from the Judge that, if the corporation were indicted for having the road in the position described, there could be no doubt they would be directed to find them guilty of having the road out of repair, would be very unlikely to take that language as merely a strong expression of opinion upon a question of fact which they were to consider. We understand the effect of this particular passage as the learned Chief Justice understood it; but we do not find in the language which followed it such an intimation to the jury of the whole question being open as he perceived. On the contrary, we find these observations: "Corporations are not to keep dangerous places on public highways where people may get into them; that is not a proper repair of the highway. When a ditch becomes such a deep and dangerous place as this, the corporation are bound to put a guard on it; otherwise, as a matter of law, they are guilty of neglect in not guarding it." It is true that the learned Judge proceeded to say: "I declined to withdraw the case from you on the ground of there being no evidence to show want of repair, not because I was going to rule to you that this road was out of repair, but because I thought there was ample evidence to go to you, as twelve reasonable men, that this road was out of repair. It is a

matter for you entirely." But we can scarcely assume that this removed from the minds of the jury the idea that the fact of permitting the dangerous ditch to exist within the Government allowance, while there was a road thirty feet wide to travel on, was conclusive of neglect of duty by the defendants, which the strong language just used was sure to convey ; or reminded them that it was incumbent on them to consider what could reasonably have been required of the defendants, in view of all the considerations properly entering into the question, as a discharge of the statutory duty to repair. Nor was the attention of the jury recalled to the duty of modifying the force of the word "repair" by reference to surrounding conditions, by the charge then directly given : " Was that road in such a reasonable state of repair that it was safe for persons passing and repassing at all times night and day ? If so, then you will find a verdict for defendants." In our opinion the defendants have a right to a finding by the jury upon the question whether the road was, having regard to all proper considerations, in a state reasonably safe and fit for the ordinary travel of the locality. We cannot come to the conclusion that this question was distinctly presented for the consideration of the jury by the charge which is complained of, and we therefore think the rule should have been made absolute for a new trial without costs, and that this appeal should be allowed with costs.

MORRISON, J. A.—This was an appeal against a judgment of the Court of Queen's Bench discharging a rule *nisi* obtained by the defendants for a new trial.

The plaintiff recovered a verdict for \$2,500, and the objections and grounds for a new trial taken in the Court below, as well as on this appeal, among others, were :

1. That there was not any evidence that the road or highway at the place in question was not in repair, the evidence showing, on the contrary, that it was in good repair, the ditch, trench, or excavation mentioned in the declaration not being or constituting a want of repair of

the said highway, within the meaning of the Statute obliging the defendants to keep highways in repair.

2. And for misdirection by the learned Judge who tried the cause, in telling the jury that the defendants were liable to be indicted, and were responsible in damages, for having the said ditch, trench or excavation in the place where it was, and as it was shown to be.

3. That there was ample evidence to show that the death of the said James Lucas was caused by his own negligence, or that he was guilty of contributory negligence, but for which the accident would not have happened to him; and although the jury, in effect, by their verdict, found against this contention, yet this finding was after a charge by the learned Judge who tried the cause, in which it was stated, amongst other things, that the fact that the said James Lucas was drunk at the time of the accident made no difference whatever, by which it is reasonable to assume that the jury were led not to give proper weight to such evidence of contributory negligence; and the said verdict is, in this respect, contrary to the law and the evidence, and should have been set aside.

As to the first objection, upon the authority of *Toms v. Corporation of Whitby*, 37 U. C. R. 100, in this Court, I am of opinion that there was evidence to go to the jury to justify their finding, that the highway at the place in question was not in repair, if the jury were of opinion that the defendants ought to have placed a fence or some sufficient barrier along the ditch in question as a protection against the happening of accidents and for the security of persons using the road. As to the second ground—that of misdirection—it appears from the evidence that the ditch or water-way in question was made by the defendants to carry off water from the adjoining and contiguous lands, and that the action of the water passing through it during several years had increased its width, so that it encroached to a very great extent upon the allowance for road. It was not contended that the usual travelled portion of the road was not in reasonable repair. The principal grounds

for misdirection complained of were that the learned Judge who tried the cause told the jury "If the corporation were indicted for having the road in the condition it was, there could be no doubt that a jury would be directed to find them guilty of having the road out of repair;" and again, that he told the jury that the corporation were bound to put a guard on the ditch, otherwise that as a matter of law they were guilty of neglect in not guarding it. To maintain this action negligence on the part of the defendants had to be proved, and whether the defendants were guilty of neglect or not was a question entirely for the jury to determine. There was contradictory evidence as to the dangerous character of the road at the place in question, on the part of the plaintiff some witnesses thinking it was dangerous and not safe in a dark night, another that it was dangerous to some extent, another that with ordinary prudence a person knowing the place would not get into the ditch unless he had wild horses. On the other hand, defendants witnesses' thought it was not dangerous to a person who knew the road, and that such a person could pass it safely on a dark night. The Reeve of the township, who travelled it frequently, said it never struck him that it was a dangerous place; the Deputy Reeve, that to a person using ordinary care there would be no danger.

The question of negligence appeared to turn upon the necessity of a fence or guard along the ditch in question. Now I think it is quite clear, either upon a trial by indictment against the defendants for having the road out of repair or in an action like the one before us, it would be a question solely for the jury to determine whether the defendants were or were not guilty of negligence in omitting to place a fence or some kind of barrier along the ditch. In *Crofts v. Waterhouse*, 3 Bing. 319, where the coachman had deviated from the road and upset the coach, injuring the plaintiff, a rule *nisi* for misdirection being granted, *Best*, C. J., in making the rule absolute for a new trial, said, a p. 320: "The coachman was bound to keep

on the road if he could, and the jury might, from his having gone out of the road, have presumed negligence, and on that presumption have found a verdict for the plaintiff. But the learned Judge, instead of leaving it to the jury to find whether there was any negligence, told them that the coachman having gone out of the road, the plaintiff was entitled to a verdict; saying further: "this action cannot be maintained unless negligence be proved, and whether it be proved or not is for the determination of the jury."

It seems to me very clear that the learned Judge erred in telling the jury that as a matter of law the defendants were bound to fence the ditch, and that they were guilty of neglect if they did not do so; also in telling the jury that if the defendants were indicted the jury would be directed to find them guilty of having the road out of repair. It was, however, contended on the part of the plaintiff, that although the learned Judge so charged the jury that he subsequently remarked to the jury that it was a matter entirely for them, and also saying, "Was that road in such state of repair that it was safe for persons passing and repassing at all times, night and day; and, also, that "they were to consider whether, having those deep and dangerous places on the road, the corporation used reasonable care in protecting them." And it was contended that these observations destroyed the effect or did away with the misdirection complained of.

After reading and considering the charge of the learned Judge, I cannot concur in the view taken upon this objection in the Court below. Nor can I acquiesce in the late Chief Justice's summary statement of the charge of the learned Judge upon which the judgment in the Court below proceeded. [The learned Judge here read from the judgment, at p. 349, 43 U. C. R.] I cannot think that where a Judge in clear terms misdirects a jury in matters of law pertinent to the issue being tried, and afterwards in the course of his charge observes to the jury that they may consider the questions and act upon their own view of the matters—that in such case the misdirection is neu-

tralized or removed. The misdirection, in my opinion, still remains, and in the case before us was well calculated to mislead the jury. When a Judge in summing up lays down to the jury propositions of law bearing upon the questions to be tried, out of deference and respect to the opinions of the Court, an intelligent jury or minds of ordinary capacity, would be impressed by the statement of the law, and would act upon it in all probability without deliberation, notwithstanding that the Judge intimated that it was a matter or question for their consideration. It is impossible, I think, for us to say, that the distinct and unequivocal statements made by the learned Judge to the jury, and which are now complained of, had not a prejudicial effect upon the case of the defendants, or that the jury did not act upon the learned Judge's view of the law, and find in that respect against the defendants. We are all well aware that there are various actions in which juries generally have a strong sympathy for or leaning in favour of plaintiffs, cases in which juries would eagerly seize upon a statement of law made to them by the Court to justify them in finding for the plaintiff.

In my judgment, the Court below, upon the ground of misdirection, ought to have made the rule absolute for a new trial.

As to the third objection, upon the question of contributory negligence, it appeared that some five witnesses testified that the deceased, just before the accident, was so intoxicated that he was not capable of conducting or managing his team on the night when the accident happened, and it was strongly urged that such evidence, on the part of the defendants, was not properly placed before the jury, as it was accompanied by observations from the learned Judge highly calculated to mislead the jury, more particularly in saying that a drunken man had as much right to the protection of a good road and every thing of that sort, as a sober man, and that the fact that deceased was drunk, made no difference whatever, if being drunk he was driving properly at the time. It may be said such an expression

of opinion on the part of the learned Judge would dispose a jury to think that the deceased's being intoxicated was of little importance, as there were no witnesses present when the team fell into the ditch. As said by Mr. Chitty, in his work on Practice: "Expressions of a Judge at Nisi Prius are not to be measured with exactness, and a proper direction is not to be objected to on account of particular expressions, if it be such as on the whole and in substance would lead to a just conclusion."

A large discretion is necessarily allowed, and unless abused to the subversion of justice the Courts are disinclined to interfere. As said by the late learned Chief Justice in the Court below, at p. 348, "Much must, in every case, be left to the good taste, sound judgment, and discretion of the presiding Judge." I cannot say from the report of the learned Judge's charge before us, that he did not in substance leave the question of contributory negligence correctly to the jury. On the ground of misdirection I am of opinion that the appeal should be allowed.

Moss, C. J. A., and BURTON, J. A., concurred.

Appeal allowed.

Ref. and Fol. 13 O.R. 70.

KELLY V. OTTAWA STREET RAILWAY COMPANY.

R. W. Co.—Negligence—Limitation of action—C. S. C. c. 66, sec. 83.

The plaintiff sued the defendants for an injury sustained by him while engaged in his lawful occupation on the street, by the defendants' car being so carelessly and rapidly driven that he was obliged to jump into a drain to save himself, and was hurt.

Held, reversing the decision of the County Court, that the 83rd section of C. S. C. c. 66, applied to a suit of this nature, and that the action should have been brought within six months.

Auger v. Ontario, &c., R. W. Co., 9 C. P. 164, and *Browne v. Brockville & Ottawa R. W. Co.*, 20 U. C. R. 202, followed.

Moss, C.J.A., and *BURTON, J.A.*, but for these decisions would have held the above section did not apply.

Per PATTERSON, J.A.—The case was clearly within the section, as the injury was sustained by "reason of the railway."

The appeal being allowed upon authorities not brought to the attention of the Court below, no costs were given.

Appeal from the County Court of Carleton.

The declaration charged, that by reason of a passenger car on the defendants' railway being driven negligently and carelessly, at a rapid rate of speed, where the plaintiff was working, he was obliged, in order to save himself from being hurt, to jump into a drain, whereby he was injured.

Plea. Not guilty by Statute. 29 & 30 Vic., ch. 16, B. N. A. Act, 1867; 31 Vic., ch. 45, O.; 14 & 15 Vic., ch. 51; Consol. Stat. C., ch. 66, sec. 83.

Issue.

The facts, so far as material, appear in the judgments.

The cause was tried before Ross, County Court Judge of Carleton, when a verdict was entered for the plaintiff, and a rule *nisi* to set the verdict aside was subsequently discharged.

The defendants appealed.

The appeal was argued on the 15th of January, 1879 (*a*).

Snelling, for the appellants. The evidence shews that the appellants were guilty of no negligence, and it is clearly established that there was contributory negligence on the

(a) *Present*.—*MOSS, C.J.A.*, *BURTON, PATTERSON*, and *MORRISON, J.J.A.*

part of the respondent. If the Court should be against us, however, on this point the appellant is entitled to succeed on the ground that the action was not brought within six months, as prescribed by Consol. Stat. C., ch. 66, sec. 83. He cited *Tuff v. Warman*, 2 C. B. N. S. 740; *Burns v. The Corporation of Toronto*, 42 U. C. R. 560; *Castor v. The Corporation of Uxbridge*, 39 U. C. R. 113; *Cornman v. Eastern Counties R. Co.*, 4 H. & N. 781; *Denny v. The Montreal Telegraph Co.*, 43 U. C. R. 584; *Metropolitan R. Co. v. Jackson*, L. R. 3 App. Cas. 197.

Moss, C. J. A., said that the Court were of opinion that the appeal could not be sustained on the ground that there was no evidence of negligence, or that there was such contributory negligence that a verdict should have been directed for the defendants. They would, however, call upon the counsel for the respondent to argue the point as to the necessity of bringing the action within the six months named in the Railway Act.

Shepley, for the respondents. This action is not within Consol. Stat. C., ch. 66, sec. 83, as it is not for an act done in pursuance of the Railway Act. He cited *Roberts v. Great Western R. Co.*, 13 U. C. R. 615; *Carpue v. Brighton R. Co.*, 5 Q. B., 747; *Palmer v. Grand Junction R. Co.*, 4 M. & W. 749; *Prendergast v. Grand Trunk R. W. Co.*, 25 U. C. R. 193; *Garton v. Great Western R. Co.*, E. B. & E., 837.

February 3, 1879 (a). Moss, C. J. A.—At the close of the argument, we held that the appeal could not be sustained, on the ground that there was no evidence of negligence proper to be submitted to the jury, or that there was, on the plaintiff's own shewing, such contributory negligence that a verdict ought to have been directed for the defendants. We reserved for consideration

(a) *Present*—MOSS, C. J. A., BURTON, PATTERSON, and MORRISON, JJ. A.

the question whether, under the Acts incorporating the company, by which they are entitled to the benefit of the clause in the general Railway Act, C. S. C. ch. 66, limiting to six months the time for instituting all suits for any damage or injury sustained by reason of the railway, the present action is barred. The plaintiff, while engaged in his lawful occupation upon the street, was injured by the negligent management of the defendants' car, and the unskilful or reckless driving of their servant. Unfortunately he did not bring his action within six months from the day of the occurrence.

I confess that I had the impression that the statute was not designed to protect a Railway Company from responsibility under such circumstances. The language of the statute did not seem to me to demand such a construction, and the *ratio decidendi* in *McCallum v. Grand Trunk R. W. Co.*, 31 U. C. R. 527, which is binding upon this Court, was expounded in such cautious terms that I thought it rather excluded from the shelter of the statute a case of negligence like that with which we are now concerned.

If our present task was to interpret the statute upon its own language, and that decision alone, I should have been very slow to arrive at the conclusion that the plaintiff's right was defeated. But *Auger v. Ontario, Simcoe, and Huron R. W. Co.*, 9 C. P. 164, and *Browne v. Brockville and Ottawa R. W. Co.*, 20 U. C. R. 202, seem to be decisions completely in point. They put an interpretation upon the section, which if adopted covers this case, and leaves no room for further enquiry. It is true that they are not conclusive upon a Court of Appeal, but as independent judgments of the two Courts of Common Law, they are not only entitled to the highest respect, but after remaining so long unchallenged, they should now, in my opinion, be accepted as authoritative, unless their incorrectness can be absolutely demonstrated. If the rule is unsound or mischievous, there has been ample opportunity for its correction by the Legislature.

The attention of the Court below was not directed to these authorities, nor were they referred to in the argument

before us, although the point was directly raised. While I feel obliged to agree that the rule should be made absolute for a nonsuit, I think there should be no costs of the appeal.

BURTON, J. A.—I think the learned Judge in the Court below, was correct in the view he entertained, that the 83rd section of the Railway Act, C. S. C. ch. 66, which has been incorporated with the defendants' special Act, was not intended to apply to a suit of this nature, and but for the decisions referred to in the judgments of some of my learned brothers, which I have had the opportunity of reading, I should have held that this appeal should be dismissed; but whilst I find it impossible to distinguish this case from some of those referred to, I desire to say it is merely on that account, and not because I agree with those decisions, that I concur in the judgment now pronounced.

I may go further, and say, that if the case of *McCallum v. The Grand Trunk R. W. Co.*, 31 U. C. R. 527, (which is the only one of the decisions which is authoritatively binding upon this Court) stood alone, I should feel myself at liberty to uphold the decision of the County Court.

The present learned Chief Justice of the Queen's Bench, in giving judgment in that case, says, at p. 533, "the defendants were using their railway as allowed by statute, *without negligence so far as the running of trains was concerned*. It was certainly by reason of the railway the injury was caused. The negligence charged was leaving combustible matter in dry weather accumulated on the track"; and adds: "The case may be readily distinguished from others where some direct malfeasance has caused injury, or where contracts express or implied are broken."

The difficulty has arisen from the use of the words "by reason of the railway," but the meaning of these words is to my mind rendered plain by the concluding passage of the section, which enables the defendants to prove without a special plea that the act complained of was done in pursuance and under the authority of the Act, and confines the protection of the Statute to acts of commission and not of omission.

The company, when sued for the omission to perform some statutory duty, were held not entitled to the protection of the six months limitation: *Reist v. Grand Trunk R. W.*, 15 U. C. R. 355.

If the defendants had not been relieved of the necessity of pleading specially, it would scarcely be contended that it would be sufficient to bring the defendants within the protection of the Statute merely to allege that the damage sought to be recovered was sustained by reason of the railway, and the action not brought within six months, but it would be necessary further to allege that the act complained of, and from which the damage ensued, was done in pursuance of and by the authority of the Act.

It has been suggested that the words found in the concluding portion of the section may be regarded as an indication that the protection of the Statute extends to matters done in pursuance or under the authority of the Act, and before the construction was completed, which it is said would not come strictly within the words "by reason of the railway"; but this is overlooking the fact that the word "railway" in the interpretation clauses of the General Railway Act is held to mean the railway and works authorized to be constructed, and is not confined to a railway completed or in working order, so that the company are as much entitled, without the aid of the later words, to the protection of this section of the Statute for works of preparation and construction as they are for any thing done after the complete formation of the railway.

In *Roberts v. Great Western R. W. Co.*, 13 U. C. R. 615, which was an action for negligence in carrying a passenger, Sir John Robinson says, at p. 616, "We are all of opinion that the Statute does not apply to an action of this nature, but only to actions for damages occasioned by the company in the exercise of the powers given, or assumed by them to be given, for enabling them to construct and maintain their railway.

This is an action charging them with negligence in the conduct of a description of business that any individual

might be engaged in without requiring the aid of legislative Acts, enabling them to take or use the property of others against their will."

This appears to me to be a correct exposition of the law, and it is to be regretted that it was departed from in some later cases.

There are numerous supposable instances where a railway company, intending to act under the terms of their charter, have exceeded their powers and become trespassers; but in such actions the damage was not only sustained by reason of the railway, but the act causing the injury was assumed to be done in pursuance of the powers conferred on them by the Statute, although they may have been exceeded or exercised under mistake.

In the present case, the defendants' servant, in doing what he did, was not acting or intending to act in the performance of any duty cast upon the proprietors of the railway; he was simply guilty of negligence in the management of the horses and car entrusted to him. It seems somewhat incongruous that they should be allowed to say: true, he was guilty of negligence, and that negligence caused the injury, but this act of negligence was in pursuance and under the authority of the Act, and so the six months limitation clause applies. But for the decisions I should have thought it too clear for argument that the section is not open to any such construction, and that the damage was not a damage sustained by "reason of the railway"; but the cases of *Auger v. The Ontario, &c. R. W. Co.*, 9 C.P. 164, and *Browne v. The Brockville, &c., R. W. Co.*, 20 U.C.R. 202, seem to warrant such a construction, and have so long been acquiesced in that I feel bound to follow them, though not convinced of their correctness, and I therefore concur in allowing the appeal. The appellants had, I think, very little faith in the objection, and did not urge it very strongly on the argument, and cited no cases in support of it in their reasons of appeal; and I think it would be proper under the circumstances to allow it without costs.

PATTERSON, J. A.—The plaintiff's complaint is, that by reason of a passenger car upon the defendants' railway being driven negligently and carelessly at a rapid rate of speed, where the plaintiff was working, he was obliged, in order to save himself from being injured by the car, to jump into a drain, whereby he was hurt. The defendants plead not guilty by Statute; and the fact being shown by the evidence that the accident happened over six months before action, they contend that under section 83 of the Railway Clauses Act, C. S. C. ch. 66, which is incorporated with their special Act, the plaintiff must be nonsuited.

That section enacts that "All suits for indemnity for any damage or injury sustained by reason of the railway, shall be instituted within six months next after the time of such supposed damage sustained, or, if there be a continuation of damage, then within six months next after the doing or committing such damage ceases, and not afterwards; and the defendants may plead the general issue, and give this Act and the special Act, and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by authority of this Act and the special Act."

The learned Judge of the County Court was of opinion that the injury in question was not sustained "by reason of the railway," as he thought the authorities showed that those terms referred to omissions to perform some duty cast upon the defendants by the Statute, or to some act prohibited by the Statute; and he adopted, as applicable to this case, language used by Bramwell B. in *Garton v. Great Western R. W. Co.*, E. B. & E. 837. That was an action for money had and received. The Statute there relied on was a Railway Act, 5 & 6 Wm. IV., c. 7, sec. 223, which provided that no action should be brought for anything done or omitted to be done in pursuance of that Act, or in the execution of the powers or authorities or any of the orders made, given, or directed, in, by or under that Act, unless twenty days' notice of action were given; nor

unless the action was brought within six months next after the act committed; or in case of a continuation of damage, then within six months after the damage ceased; and that the defendant might plead the general issue, and give that Act and the special matter in evidence, and that the acts were done or omitted to be done in pursuance of or by the authority of the Act. The defendants had pleaded want of notice of action, and had succeeded upon the issue in fact joined upon that plea. Then error was brought in the Exchequer Chamber, and the question of the necessity for notice of action in that suit for money had and received was argued.

In giving judgment, Bramwell, B., used the language quoted by the learned Judge, saying that notice is required only in the case of some act or omission warranted or supposed to be warranted by the statute; that the question was always whether there was *bona fides*; and that the plea to be good must, in express terms, or by implication, shew the thing done or omitted under the Act. Similar statements of opinion were made by the other Judges. What they did was simply to apply to that case the elementary principle of pleading that when a statute accords protection in certain circumstances, a plea which claims that protection must shew that the circumstances exist, unless they are already disclosed by the declaration.

The clause in question in that case is one which, with occasional variations in its language, is very usual in English Acts authorizing railways or other enterprises. The cognate provision included amongst our railway clauses is evidently framed upon the English form; but our Legislature has thought fit to introduce a phrase not found, so far as I am aware, in any of the English Acts, and therefore emphasized by this evidence of being deliberately selected. This phrase is, "by reason of the railway." It takes the place of the words which in the Act discussed in *Garton v. Great Western R. W. Co.*, E. B. & E. 837; were "for anything done, or omitted to be done in pursuance of this Act, or in the exercise of any powers or

authorities, or any of the orders made, given or directed in, by, or under this Act." The substituted phrase is, in one direction at all events, more {comprehensive than the original, as it is capable of extending to many occurrences which are not done or omitted in pursuance of the statute; while in the other direction it is easy to perceive that some things done or omitted in pursuance or by authority of the Act, could not, with strict precision, be said to be by reason of the railway; such, for example, as works of preparation and construction, which must be in progress for a long time before they result in the formation of a railway.

This more extensive effect of the word "railway," is further fixed by the interpretation clause, which declares that it shall mean the railway and works by the special Act authorized to be constructed.

Our Canadian clause, after the departure which I have just noticed, follows the English model very closely, so much so as somewhat unnecessarily to grant permission to give the Railway Clauses Act, which is a public general Act, in evidence.

The effect of the decision in *Garton v. Great Western R. W. Co.*, E. B. & E. 837, on which the learned Judge relied, as applied to our statute, is, therefore, that it must appear in pleading and in evidence that the damage was sustained "by reason of the railway," those words including, but not necessarily being confined to, acts done in pursuance or by the authority of the Act.

We have then to consider, without embarrassment from considerations outside of the words themselves, was the accident in question occasioned "by reason of the railway?"

I do not discuss the propriety of the finding for the plaintiff on the merits. The verdict is one which is warranted by the evidence, and it has been rendered after a fair trial, and a proper charge from the learned Judge. I think the defendants are liable to the same extent as if the car had been actually driven against the plaintiff when he was upon the track, and when the driver could, by ordinary care and vigilance, have checked its speed so as to have

given the plaintiff time to escape. The liability cannot rest on stronger ground than that. Had that been the nature of the accident, the injury would, in the most literal import of the words, have been sustained by "reason of the railway."

The contention, that because the injury might have been avoided by care and vigilance, and is therefore attributable to the negligence of the driver, it cannot properly be said to have occurred by "reason of the railway," cannot be maintained. It would limit the effect of the protective clause to cases in which the defendants had done no wrong, and so in effect make it a useless enactment.

The construction relied on by the defendants has, I believe, been uniformly given to the Act in the cases which have come for decision before our Courts of Queen's Bench and Common Pleas, and before the Court of Error and Appeal.

A similar enactment was relied on in *Browne v. Great Western R. W. Co.*, 13 U. C. R. 615, as a defence to an action for negligence in conveying passengers under the implied contract by the railway company as carriers. It was held that the limitation did not cover an action of that character; and Sir John Robinson is reported to have said that it applied only to actions for damages occasioned in the exercise of the powers given to the company for enabling them to construct and maintain their road. But this observation, which was not necessary for the decision of the case, was founded on a more narrow view of the effect of the Statute than was adopted in subsequent cases.

Reist v. Grand Trunk R. W. Co., 15 U. C. R. 355, was an action for not making a farm crossing, which as the law then stood the defendants were bound to make for the plaintiff's use. It was held that the action being for non-feasance, the limitation clause did not apply.

Auger v. Ontario, Simcoe & Huron R. W. Co., 9 C. P. 164, an action claiming damages for the plaintiff's horses which had been killed by a locomotive on the defendants' railway, was one of the earliest cases in which the question

arose in the shape in which it is now presented. In giving judgment, Sir William Richards said: "It is argued that the provisions of the statute limiting the time of bringing the action do not apply when the act complained of is not caused in the construction of the road; or, at all events, when the matter arises from the negligence of defendants in managing their locomotives. The running of the locomotives is in exercise of the powers conferred by the Act, and if it is only done in such a way as the law permits, no action ever could be maintained against the company, and there would be no use of any legislative provision for limiting the time of bringing such actions. Unless that provision of the statute is to be considered inoperative, it must extend to cases like the present."

In accordance with this opinion, it was held in *Browne v. Brockville & Ottawa R. W. Co.*, 20 U. C. R. 202, that the limitation protected the company in an action for a collision at a railway crossing by which the plaintiff was injured, and which was caused by the neglect to ring the bell or sound the whistle on the locomotive.

Sir John Robinson referred to the difference between the English special Acts and our Act, which I have already noticed, and made the following remarks on the effect of the statute: "As to the cause of damage arising from the improper or imperfect construction of the crossing, that does certainly come expressly within the words in our statute. It was damage or injury sustained 'by reason of the railway.' * * As to the other ground of complaint, the omitting to give the proper signals of approach, that does not come expressly within the words of the clause, because it may be said that the damage was not sustained 'by reason of the railway,' but rather by reason of the manner in which the carriages on the railway were driven; but we think the substance and effect are the same in the one case as in the other. 'By reason of the railway,' is a very comprehensive expression, and we think extends to an injury sustained on the railway by reason of the use made of it."

In *Brown v. Grand Trunk R. W. Co.*, 24 U. C. R. 350, damage to cattle by reason of the neglect by the defendants of their statutory duty to erect fences, was held to be damage to which the limitation clause applied.

In *McCallum v. Grand Trunk R. W. Co.*, 30 U. C. R. 122, and in Appeal 31 U. C. R. 527, the negligence charged was allowing dry wood and leaves to accumulate on the railway, which became ignited by fire dropped without negligence from the defendants' locomotive, and spread to the plaintiff's land, destroying his trees, &c. This was held to be damage sustained "by reason of the railway," in the first place by the Queen's Bench, on grounds expressed by my brother Morrison, who delivered the judgment of that Court, and afterwards by the unanimous judgment of the Court of Error and Appeal.

We should be bound to hold upon the authority of these decisions, even if we were not satisfied that it was the true effect of the clause, that the limitation is fatal to the present action. For my own part I entertain no doubt that the plaintiff's injury is properly described as having been sustained "by reason of the railway."

I think the appeal should be allowed, and the rule made absolute to enter a nonsuit; and I agree that, on the ground that we decide upon considerations which do not appear to have been distinctly brought before the notice of the Court below, there should be no costs of this appeal.

MORRISON, J. A., concurred.

Appeal allowed.

Diss. 7 A.R. 478

DENNY V. THE MONTREAL TELEGRAPH CO.

Assessment of damages by the court, and entry of verdict under C. L. P. Act, R. S. O. ch. 50, sec. 287.

The plaintiff sued as personal representative of her husband, who had been killed by falling through a trap door in the floor of an office of the defendants, to recover damages under the statute (R. S. O., ch. 128.) A verdict was entered for the defendants by the Judge before whom the case was tried without a jury.

It was held by the Court of Queen's Bench, (34 U. C. R. 577) that the defendants were liable, and that the plaintiff was entitled to a verdict; but damages not having been assessed, a new trial was ordered.

The Court of Appeal, without deciding that it would have disturbed the finding at the trial, held that no sufficient reason was shown for reversing the decision of the Queen's Bench, which was the immediate subject of the appeal; but, held, also that the Court should have assessed the damages and entered the verdict, which in its opinion should have been entered at the trial; and accordingly assessed the damages, and varied the rule by directing a verdict to be entered for the amount.

This was an appeal from the judgment of the Court of Queen's Bench making absolute a rule *nisi* for a new trial, reported 42 U. C. R. 577. The pleadings and facts are stated there, and in the judgments on this appeal.

The case was argued on the 18th May, 1878.

C. Robinson, Q. C., for the appellants.

S. Richards, Q. C., for the respondent.

The arguments and cases cited were substantially the same as in the Court below.

February 3, 1879 (*a*). BURTON, J. A.—It was urged by the defendants' counsel, and was among the reasons stated in the printed case against the appeal, that even if there were evidence of contributory negligence it was in the discretion of the Court to grant a new trial, and that an appeal in such a case will not lie; and if the Court below had, in the exercise of their discretion, granted a new trial because the verdict was in their opinion against the evidence or the weight of evidence, and it was desirable therefore to submit

(*a*) *Present*.—HAGARTY, C. J. C. P., BURTON, PATTERSON, and MORRISON, J. J. A.

the case to a jury or for consideration by another Judge, the appellant could not, according to the practice and the rule laid down in the statute, raise that question on appeal. But that is not the way in which the case comes before us. The Court of Queen's Bench had the power to review the decision of the learned Judge at the trial, and to pronounce the verdict which in their opinion he should have given; they have assumed to do this, and have come to the conclusion, as I understand their judgment, that there was no evidence properly bearing upon the question of contributory negligence on which a finding could reasonably be had, and that it would have been the duty of the Judge if this case had been tried by a jury to have withdrawn that evidence from their consideration. This is the language of the Court upon that point at page 587:—

“But why was Denny to look out for an open trap door when he entered the office? He was not bound to look for it. He had no cause to look for it. He believed, and he was invited to believe, there was no such trap, and that he need not look for one. That he did not look for one, and did not see it, is not at all wonderful, and it was no evidence of negligence on his part that he neither looked for it nor saw it.

“*It is not therefore the least evidence of negligence against Denny that he did not happen to see it. It was undoubtedly his misfortune, but I cannot say it was his fault. He had no more reason to look for a hole in the floor than to look for a load of bricks over his head.*”

And I also understand the Queen's Bench to have held that the facts proved in the plaintiff's case, and uncontradicted on the part of the defendants, “that there was an open unguarded trap in the floor of their public office to which customers were invited,” *per se* amounted to negligence, and that a jury should have been so directed.

It may be that these are correct views of the law, but I cannot divest myself of the idea that all these matters would have been properly within the cognizance of a jury, upon whom the duty would have devolved of deciding,

upon all the facts of the case, the question of negligence or contributory negligence.

Here, by reason of the case having been tried without a jury, the Queen's Bench had the power to review both the facts and the law, and in the concluding portion of Mr. Justice Wilson's judgment he says, referring to the decision of the Judge at Nisi Prius: "I form an entirely opposite opinion, both upon the law and on the facts of the case. If the damages had been assessed I should have felt bound to enter a verdict for the plaintiff."

As regards the facts, we have now nothing to do with the consideration that the Judge who tried the case had not only the advantage of seeing the witnesses, but also that he had an opportunity of forming a judgment from a personal inspection of the premises where the accident occurred. The learned Judges of the Queen's Bench have apparently come to a different conclusion upon the facts as well as upon the law.

In either view there can be nothing gained by submitting the question to another jury. If a jury upon the same facts find as the learned Judge did, the Court would scarcely give more consideration to their finding than they have done to that of the Judge, and the verdict must be again set aside, and it would to my mind be the duty of the presiding Judge at the trial to state to the jury, that in accordance with the ruling of the Queen's Bench negligence was established which entitled the plaintiff to recover, and to withdraw the evidence of contributory negligence altogether from their consideration.

Whether we should have come to the same conclusion as the Queen's Bench in reviewing the decision of the Judge at the trial it is not necessary to discuss, but as they have on full consideration felt at liberty to do so, we see no sufficient reason as an Appellate Court for arriving at a different conclusion; but we think it would have been proper for them to have gone further, and to have given the verdict which in their opinion the Judge should have pronounced, and we feel it to be our duty now not to put the parties to

the needless expense of a new trial, but to assess the damages, which we fix at twelve hundred and fifty dollars, to be thus apportioned :

To the widow	\$400
To James Stevenson Denny	150
To Lillie Jane	175
To Archibald.....	225
And to Jessie Robertson Denny.. ..	275

The rule, therefore, will be varied to this extent, and a verdict entered for the plaintiff accordingly.

PATTERSON, J. A.—The defendants obtained a verdict, and the plaintiff having obtained a rule *nisi* for a new trial, on the ground that the verdict was contrary to law and evidence, has procured the judgment of the Queen's Bench in her favour making absolute the rule, upon the ground, as explained by the learned Judge who delivered the judgment of the Court, that both in law and upon the facts the plaintiff was entitled to succeed, but that damages were not assessed, and therefore the new trial was granted.

In our opinion there ought not to be a new trial. So far we seem, in words, to agree with the appellants. But we intercept the new trial, not because we overrule the judgment of the Court below upon the merits, but because we supplement it by assessing the damages; and thus the result is the failure, and not the success of the appeal.

I do not know that I can usefully add anything to what has been said by my brother Burton; but as we dispose of the case in a somewhat unusual way, I desire to state shortly in my own language the grounds upon which my judgment proceeds.

Evidence having been given in support of the charge of negligence made by the plaintiff against the defendants, the defendants proposed to establish that the deceased had by his own negligence contributed to his misfortune. If the case had been tried by a jury it would have been the duty of the Judge to tell them that there was or was not evi-

dence from which the contributory negligence could properly be inferred, just as he would have left the question of the defendants' negligence to them or have nonsuited the plaintiff, according to his opinion as to there being or not being evidence to support the charge.

The judgments of the majority of the learned lords in the recent case of the *Dublin, Wicklow, and Wexford R. W. Co. v. Slattery*, L. R. 1 App. Cas. 1155, is to the effect that a Judge cannot without usurping the functions of the jury decide that contributory negligence is established, however clear the evidence of it may be, and on that ground withdraw the case from the jury; but I apprehend there can be no doubt of the right and the duty of the Judge to rule in a proper case that there is no evidence of contributory negligence: *Metropolitan R. W. Co. v. Jackson*, L. R. 3 App. Cas. 193.

In the case before us the learned Judge at the trial, discharging the functions of both Judge and jury, considered that there was evidence of contributory negligence; and further decided that such negligence was established. The former proposition was a matter of law; the latter one of fact. I should find it difficult to say that as to the former the decision was wrong, as although I might perceive very strong reasons for thinking that a man with his mind full of the emergency which took him to the defendants' office, and nervously anxious to have his business speedily despatched, might without any imputation upon his vigilance walk into an open trap door, I could scarcely say that as a matter of law the circumstances would not justify a verdict against him.

I have given this part of the subject careful consideration, though possibly not so thorough as if the decision of the case turned upon it, and the result in my mind is what I have expressed. The cases to which we have been referred, including those cited in the judgment below, do not appear to furnish much assistance. They affirm the liability for negligence under the facts found in a variety of cases, frequently asserting the sufficiency of the evidence

to sustain the verdicts, with which therefore the courts declined to interfere; but not laying down any general principle which would require the withdrawal from a jury of such evidence as, in this case, is afforded by the circumstances in which the accident happened.

It becomes comparatively immaterial whether in our opinion there was or was not evidence fit to be taken into consideration, because the Court of Queen's Bench, differing from the Judge who tried the case, has pronounced upon the evidence against the defendants.

This was clearly within the jurisdiction and power of the Court; or rather would have been so, under the R. S. O. ch. 50, sec. 287, sub-sec. 2, if the Court had gone on to pronounce the verdict which the Judge who tried the case ought to have pronounced. The alternative jurisdiction under that clause is to grant a new trial, or to adjust the verdict.

It is not usual, in sending a case down for a new trial of the issues, to embarrass the decision of the Judge or jury before whom it has to come by such an expression of opinion as to amount in effect to a direction that upon similar evidence the facts must be found in a certain way.

Under the judgment pronounced in this case it would be obviously useless to submit the case to a jury with any other view than to have damages assessed.

If we dismiss the appeal we affirm the conclusions of fact which form part of the judgment; and we cannot allow the appeal without deciding that the Court was in error in drawing those conclusions from the evidence. There is no middle course, because the new trial is ordered as a matter of right, not of discretion.

It is not our duty to form an independent judgment upon the facts as if we were trying the case in the first instance. Our inquiry is, Was the Court of Queen's Bench wrong in the conclusions at which it arrived? I am not prepared to say so. I can without difficulty perceive considerations of great force in support of those conclusions; and if the Court, in overruling the view taken by the Judge at the trial, proceeded upon evidence sufficient to sustain its decision,

it is not for us to balance the testimony or discuss its effect for the purpose of finding to which side the weight of it may seem to incline. We may be strongly of the opinion that we should not have disturbed the original finding, but we should now have to say that that of the Queen's Bench is wrong.

On the whole, therefore, as I gather from the terms of the judgment as reported to us, and which state that in fact as well as in law the finding is for the plaintiff, and that a verdict would have been entered for the plaintiff in place of a new trial being ordered, if damages had been assessed, that that judgment was pronounced on the assumption that the Court was proceeding under the clause of the statute to which I have referred; and as I understand the idea in granting a new trial merely to have been to have damages assessed—because if there had been an intention to have the facts again investigated the Court would have refrained from expressing so decided an opinion upon them; and there being no new facts to be elicited, a new trial would, under the circumstances, inevitably be a mere assessment; and as the statute makes the finding of the Judge subject to revision by the Court only when the Court proceeds to enter the verdict he ought to have entered; and as that power involves the power to assess the damages when necessary; and as we have before us all the data which were before the Judge at the trial on which to make the assessment; and as we have (R. S. O. cap. 38, sec. 22,) all the powers and duties as to amendment and otherwise of the Court, from which the appeal is had; and (sec. 23) power to dismiss an appeal, or to give any judgment and make any decree or order which ought to have been made; I have no doubt that our proper course is, to terminate the litigation by ordering that in place of the rule granting a new trial, a rule absolute be issued to enter a verdict for the plaintiff for the amounts mentioned by my brother Burton.

Neither party is entitled to costs upon this appeal.

HAGARTY C. J. C. P., and MORRISON, J. A., concurred.

Appeal dismissed.

RUSSELL V. ROMANES.

Specific performance—Improvements—Lien for—36 Vic. ch. 22, O.—Statute of Limitations.

The bill was filed to enforce specific performance of an agreement to sell certain land, made by one R., since deceased. The original agreement was cancelled, and on the 22nd of May, 1866, another agreement for sale, contained in a lease of the land from R. to the plaintiff, was substituted therefor. In November of 1865, when the original agreement was entered into, R., who held two mortgages on the land in question, thought he had obtained an absolute title thereto, by proceedings in a foreclosure suit on these mortgages. It afterwards, however, appeared that long prior to the first of the mortgages held by R., the mortgagor, T. H. had, by a voluntary deed, conveyed 50 acres of the land to his son, E. H. Subsequently, to the first mortgage to R., but prior to the the second mortgage, E. H. mortgaged the 50 acres to one A. E. H. was not made a party to the foreclosure suit, but A. was served with notice of the proceedings in the Master's office, and not having appeared, he and the mortgagor were declared foreclosed. Soon after the above agreement for sale in September, 1866, R. filed a bill against T. H., E. H., and A. for the foreclosure of his two mortgages against all these defendants, when a decree was made declaring the deed to E. H. to be void against R., and that A.'s mortgage was subject to the first mortgage, but had priority over the second mortgage held by R., and he was directed to pay into Court a certain sum as the price of redemption, which payment was made at the appointed time. It appeared that the plaintiff had actual notice of E. H.'s outstanding equity of redemption before he made any improvements; and that he made them in reliance upon R. holding him harmless.

Held, affirming the decree of Proudfoot, V. C., that the plaintiff was not entitled to a decree for specific performance against the representatives of R., as they had no power to convey, nor against A., because there was no privity between him and the plaintiff, and no equity to make him bound by the agreement.

Held, also, that the plaintiff was not entitled to a lien on the land for his improvements.

Held, also, that the plaintiff had not acquired any rights by virtue of the Statute of Limitations, inasmuch as his possession was that of a tenant and was not exclusive of the mortgagor.

Appeal from the decree of Proudfoot, V. C.

It appeared that in 1861 one Thomas Hearn, being the owner of the lands in question in this cause, mortgaged them to the Rev. George Romanes. He subsequently, in July, 1863, executed a second mortgage to one Campbell, who was in fact acting as agent for Romanes.

Default having been made in payment of the mortgage to Romanes, he filed his bill in 1865 for foreclosure against Thomas Hearn, making the subsequent mortgagee Campbell and one Henry Allinor parties in the Master's office. Such proceedings were had in this suit, that in October,

1865, Romanes obtained a final order of foreclosure against all the defendants.

In 1850 Thomas Hearn had executed a voluntary conveyance of fifty acres of the lands in question to his son Ebenezer Hearn, who in April, 1863, mortgaged it for its full value to Allinor, both deeds being registered shortly after their dates respectively.

Ebenezer Hearn, in April, 1869, conveyed his equity of redemption to Allinor, the defendant. Allinor mortgaged for valuable consideration to Atkinson, the defendant, in September, 1876.

After Romanes had foreclosed Thomas Hearn, Campbell and Allinor, he discovered that the interest of Ebenezer Hearn had not been got in, and in September, 1866, he filed another bill against Thomas Hearn, Ebenezer Hearn, and Allinor, praying that the conveyance from Thomas Hearn to Ebenezer Hearn might be declared fraudulent and void as against him. A decree was made in this suit in 1867 declaring the above deed fraudulent and void as against Romanes, and postponing Allinor's mortgage to that of Romanes, but giving it priority over that of Campbell. This decree also gave the defendants liberty to redeem the several mortgages and referred it to the Master to take the necessary accounts.

Owing to an appeal from the Master's report, the amount payable to Romanes was not finally ascertained until March, 1876, at which time the Rev. George Romanes was represented by the defendants Isabella Romanes, George John Romanes, and James Romanes. The Master appointed the 29th September, 1876, as the day for redemption, and the defendant Allinor duly paid on that day the amount found due, and became entitled to a conveyance and the possession of the whole mortgaged lands.

The plaintiff in this suit claimed, under an agreement to purchase entered into on the 4th November, 1865, (after the first foreclosure,) between him and the Rev. George Romanes, to be entitled to the lands in question, notwith-

standing the payment by Allinor under the decree in the second suit. Under this agreement the plaintiff became tenant of one-half the lands in question, and purchaser of the other half, and immediately entered into possession of them. He found the lands in such a neglected and dilapidated condition that it was necessary for him to change the agreement with Romanes, and a new agreement was entered into between them, which was expressed in a deed bearing date the 22nd May, 1866, whereby Romanes demised the said premises to the plaintiff for the term of six years from the 1st March, 1866, at a yearly rental of \$254, whereof \$200 was agreed upon as rent proper and \$54 as the yearly interest on \$900, which Romanes agreed to advance for the erection of suitable buildings. Romanes thereby further agreed to sell, and the plaintiff agreed to purchase the premises for \$6,200, payable in twelve equal annual instalments from the 1st March, 1872. The plaintiff had been in possession of the lands from November, 1866, and had expended large sums in improving the property.

By this bill, which was filed in 1876, he sought a specific performance of his agreement, claiming that his rights under his agreement with Romanes could not be prejudiced by the decree in the second foreclosure suit, to which he was not a party, and before the institution of which his rights had accrued. He also relied, as against Allinor and Atkinson on his possessory title.

In any event, he claimed a lien on the property for the value of the improvements made by him.

The plaintiffs in the second suit of *Romanes v. Hearn*s, 22 Gr. 469, had presented a petition in that suit, claiming to be allowed for these same improvements, but it had been dismissed with costs.

The defendant Atkinson was a mortgagee of Allinor's interest.

Proudfoot, V. C., dismissed the bill, as against Allinor and Atkinson, giving the plaintiff an account as against the Romanes of the value of lasting improvements, and

ordering payment to the plaintiff by these defendants of whatever might be found due.

The plaintiff appealed.

The case was argued on the 9th September, 1878. (a)

Mowat, Q. C., and *Bethune*, Q. C., for the appellants. When the contract of purchase between the plaintiff and Romanes was made, on the 22nd May, 1866, Romanes had a good title to the whole property by virtue of his foreclosed mortgage, with the exception of 50 acres which Ebenezer Hearn claimed under a deed made to him long previously by his father. The contract was not an option to purchase, but an actual present sale on certain terms of payment, although the plaintiff was to pay what is called rent instead of purchase money for some years, and although there was a demise of the premises. He became at once the equitable owner of the fee, and by virtue of the demise he had a legal term of years. As between the plaintiff and Romanes the instrument governed and still governs their rights. It is clear that after this sale Romanes could not confer and no one could acquire by or through him or by or through any act, deed or default of his any higher right than he himself then had. When Romanes opened the foreclosure by the bill he subsequently filed he opened it only as against himself and only to the extent of his interest as vendor. It is clear that if after foreclosure the mortgagee sell and convey part of the mortgaged premises and then let the mortgagor in to redeem, the purchaser of the parcel sold is not and cannot be affected, and the mortgagor must be content to take the purchase money in lieu of the parcel sold. It follows that the defendants in this foreclosure suit stand no higher than Romanes, and when they redeem him they do so subject to the plaintiff's rights under his contract. The plaintiff has continued in undisturbed possession under his contract until the present

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time, and before the filing of his bill had acquired by virtue of the new Statute of Limitation a perfect title against all the world except his vendor and those claiming under him. When the plaintiff went into possession, and from that time till the 6th of July, 1876, Ebenezer Hearn might have attacked him for the 50 acres, but he never did so, and he could not keep alive his claim against the plaintiff by his litigation with Romanes. He contented himself with fighting Romanes, and must be satisfied with what he got from Romanes, and that is determined by the contract. Whatever right the defendants or any of them ever had outside of the contract of sale accrued more than ten years before the suit and are barred, for the statute extinguishes the right. Notice of Ebenezer's claim is immaterial. In any case it could only affect the 50 acres, but notice does not stop the operation of the statute, and so far as the 50 acres are concerned the plaintiff's case depends on the statute alone. As to the rest of the land, the title of Romanes having been perfect at the time of the sale, the plaintiff's right to the specific performance is clear independently of the statute. The learned Judge in his judgment has treated the question of the Statute of Limitations as if it were between the plaintiff and Romanes, and the case cited was a case of that sort, but it is not contended that the plaintiff could put up the statute or any other defence against Romanes to the extent of his rights as vendor. The plaintiff here was no mere tenant for any part of the time. Romanes had sold to the defendant his whole equitable interest in the land, and had nothing whatever left but a right to certain payments of money and certain remedies therefor. When it is said that the possession of a tenant is the possession of his landlord, that is not literally true; it means no more than that there is a privity between them in respect to the land, and that persons dealing with the tenant do so subject to the landlord's rights. The principle therefore cannot be invoked for the purpose of giving to a third person, through the landlord, rights which the landlord himself did not possess and could

not assert. The effect given in the judgment to the affidavit made by the plaintiff is not warranted. The plaintiff was requested by Romanes' solicitor to make an affidavit in a suit to which he was no party with regard to the improvements made by him upon the property, and by this affidavit he is held to have abandoned his own title and to have acquiesced in the title of Allinor. There was no untrue statement in the affidavit. There was no suppression or concealment of any facts. The contract of sale was set out in the petition for the improvement, and was proved in evidence. The defendants were not misled or deceived in any way by the affidavit, nor was there any question of the plaintiff's title in that cause or in that proceeding, and it is contended that the affidavit did not and could not amount either to abandonment or acquiescence. Abandonment and acquiescence must be intentional and deliberate, and cannot be the result of accident. The affidavit in this case shews effectually that there was no intention to abandon the contract, but the reverse. There was no impropriety in Romanes seeking to be allowed his improvements on his being redeemed. The money Romanes advanced for improvements was included in the contract price, and on redemption would go to Allinor in lieu of the land, and so unless Romanes got an allowance for his improvements in his mortgage account, he must lose it altogether. The plaintiff could not object to Romanes' claiming to be allowed for improvements. He was quite justified, and it was his duty to make an affidavit of the facts so long as it was not for an illegal or dishonest purpose. The decision against Romanes' right to improvements is not now questioned, but the result of that decision is that Romanes loses altogether the sum of \$900 advanced by him whether the present suit succeeds or fails, and Allinor gains that sum for nothing. If this suit fails, however, Allinor gets the land with all its improvements, including the \$900 advanced by Romanes, without paying for them. If the plaintiff succeeds, Allinor still gets the \$900 as part of the purchase money, which in that case would represent

the land. Therefore Romanes' application for improvements, though not granted, was neither illegal nor dishonest, but was fair and *bona fide* application, and it is contended that merely to make an affidavit in support of such an application cannot *per se* have the effect contended for. They cited *Skae v. Chapman*, 21 Gr. 534; *Kay v. Wilson*, 24 Gr. 212, R. S. O. ch. 95 sec. 44; *Jones v. Beck*, 18 Gr. 671.

Boyd, Q. C. (*W. Cassels* with him). The first suit of *Romanes v. Hearn*s, was defective, inasmuch as Allinor was not properly a party to the suit, having been served in the Master's office; nor was Ebenezer Hearn's a party. By filing a new bill the plaintiffs themselves admitted that they did not consider the first suit and decree therein as binding or valid. There was no agreement for sale to the plaintiffs which could be enforced against Romanes, and if not enforceable against him the defendants, Allinor and Atkinson have a right to avail themselves of any defence open to him. The plaintiff cannot avail himself of the Statute of Limitations. It is clear that he had actual knowledge and notice of the defect in Romanes' title before he entered into the alleged agreement. If otherwise entitled to specific performance, he has deprived himself of any right thereto by his conduct. They referred to *Polk v. Clinton*, 12 Ves. 58; 2 W. & T. L. C. 148, Am. ed.; 33 Beav. 560; *Whitmore v. Humphries*, L. R. 7 C. P. 1; *Walker v. Jones*, L. R. 1 P. C. 61; *Romanes v. Hearn*s, 22 Grant 469; *Howard v. Wolfenden*, 14 Grant 191.

February 3, 1879 (a). Moss, C. J. A.—At first sight this appeal seemed to present some curious complications, besides raising a point of Chancery practice, upon which there might be room for difference of opinion. But when attention is directed to the precise head of equity under which the plaintiff must seek relief, much of the difficulty vanishes, and I think that our judgment must be governed

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by the application of sufficiently simple and familiar principles.

The plaintiff stands upon the footing of a contract to purchase certain lands from the Rev. Mr. Romanes, since deceased. He appeals, therefore, to the exercise of the discretionary jurisdiction of the Court to enforce specific performance of the agreement.

In such a case no doctrine is more firmly established than that the Court will refuse to make a decree, the performance of which cannot be enforced, because the vendor has no title to the land. Until recent legislative extensions of the jurisdiction, the Court could not even award damages, when it appeared that the vendor was disabled from conveying; and that was the rule, although the disability arose from his own wrongful act, as for example where he had subsequently conveyed the estate for value to a person who had no notice of the prior contract. The principle was, that the Court would not make a vain and fruitless decree. I think that that rule must be applied to this case.

In the stating part of the bill there are set forth two agreements, one made in November, 1865, and the other in May, 1866, but as the latter was in substitution for the former, it is upon it the plaintiff relies, as the footing upon which he seeks relief. By the prayer he asks that this agreement may be specifically performed, or that it may be declared that he is entitled to a specific performance, except as to the fifty acres described in the conveyance from Thomas Hearn to Ebenezer Hearn, or that he may be entitled to a lien in respect of his improvements and payments, or that he may be paid these sums, even if he has no lien, and that the representatives of Romanes may be enjoined from conveying to their co-defendants or any other person.

The representatives of Romanes oppose no objection to specific performance, provided they are protected by the Court from liability to their co-defendants. Indeed, it is impossible to shut one's eyes to the indications that the

litigation is being conducted with a view to the interest of the Romanes' estate, as well as of the plaintiff. But such a submission manifestly does not give the Court jurisdiction to decree specific performance even against the representatives of Romanes, and still less against the other defendants, who are resisting the plaintiff's claim *in toto*, and with whom he has no privity.

It will be perceived that the branches of relief above sought are all incidental to and growing out of the assumed right to specific performance and its statutory enlargements. It is, I think, perfectly clear that a decree for specific performance, either with or without abatement, cannot be made against the representatives of Romanes, because they have not the power to convey, or against the other defendants, because there is no privity of contract between them and the plaintiff, and no equity to make them bound by the agreement.

In November, 1865, when the original agreement was made, Romanes, who held two mortgages, undoubtedly believed that he had acquired an absolute title by the proceedings in a foreclosure suit, which had just previously been brought to a final termination. In fact, however, there was a defect in the proceedings, which left Romanes still liable to be redeemed.

Long prior to the first of the mortgages held by Romanes, the mortgagor had conveyed fifty acres of the land to his son, Ebenezer Hearn. This deed was voluntary, and therefore the mortgagee acquired a paramount right, but the grantee was entitled to redeem. After the first mortgage to Romanes, but prior to the second mortgage he held, Ebenezer had mortgaged the fifty acres for value to the defendant Allinor. Ebenezer was not made a party to the foreclosure suit. Allinor was served with notice of the proceedings in the Master's Office, and not having appeared, he and the mortgagor were declared to be foreclosed.

Very soon after the first agreement for sale was made with the plaintiff, the existence of the outstanding equity of redemption in Ebenezer Hearn seems to have been dis-

covered, for in January, 1866, a petition was filed by Romanes to quiet the title, and notice was served upon Ebenezer, who set up his deed; whereupon further proceedings seem to have been dropped.

I may remark at this point that the learned Vice Chancellor has found, and there is not the least reason for questioning the correctness of the conclusion, that apart from the notice furnished by the registration of the petition, the plaintiff had notice before he made any improvements that Ebenezer was asserting a claim to the fifty acres. Then in September, 1866, Romanes filed his bill against Thomas Hearn, Ebenezer Hearn, and Allinor, for the foreclosure of his two mortgages against all these defendants. His position was contested, but the result was a decree declaring the deed to be void, as against Romanes, by virtue of the Statute of Elizabeth, and that Allinor's mortgage was subject to the first mortgage, but had priority over the second mortgage held by Romanes, and redemption was ordered in accordance with these declarations. I apprehend there can be no question that these proceedings were conducted in good faith with the expectation that they would result in cutting off the right to redeem, and thus enable Romanes to perform his contract with the plaintiff. That expectation was not realized, for after protracted litigation the defendant Allinor was directed to pay into Court a certain sum as the price of redemption, and this payment was made at the appointed time. I think there can be no doubt that the plaintiff was perfectly cognizant of these proceedings, and indeed during their progress, and so recently as 1875, he made an affidavit in support of a petition by the representatives of Romanes, to be allowed to charge Allinor for the improvements made by him, as tenant under the lease or agreement of May, 1866. I have detailed these proceedings at greater length than I otherwise should have done, because a statement of their character is necessary to the apprehension of the ingenious argument mainly insisted upon by the Attorney-General. He contended that by the contract the plaintiff became the equit-

able owner of the premises, and that Romanes then had a good title by virtue of the first foreclosure suit to all but the fifty acres; that after the sale no one could acquire through him any higher right than he himself had; and that by opening the foreclosure and letting in Allinor again to redeem, he only gave Allinor the right, which he himself had, namely, that of taking the plaintiff's purchase money in lieu of the lands. That argument will not, I take it, bear examination. In the first place, even if Romanes did make a mistake in his mode of procedure in the second suit,

was an honest mistake. He thought that he was taking the proper steps to enable him to complete his contract. My own impression is, that he was bound to make Allinor a party to that suit, but at any rate it was a prudent precaution. Again, Allinor is not now redeeming in respect merely of the interest foreclosed in the first suit. He is now the assignee of Ebenezer Hearn, and a new right is vested in him. No equitable ground can be suggested why he should be deprived of this right. I cannot conceive of any reason why Ebenezer, or his assignee, should now at the instance of the plaintiff, be prevented from taking advantage of the right to redeem, and this is precisely what the plaintiff is striving to effect. After Allinor has successfully struggled for his rights, and the price of redemption has been fixed, and after he has raised the money, perhaps, at a sacrifice, it would be monstrous injustice to oust him from his position, at the demand of one to whom he was under no obligation, either legal or equitable.

The plaintiff founds a further claim to relief upon the proposition that he had been in possession more than ten years before the filing of the bill, and that he had therefore acquired a statutory title against all the world except Romanes. I have not been able to follow the precise train of reasoning, by which it is conceived that this possession has created any equity against Allinor. The object aimed at is to prevent him from insisting upon the benefit of the redemption suit, and thereby obtaining a reconveyance from Romanes, against which the bar of the statute could

not prevail. How the mere possession of the plaintiff can be deemed to create such an equity, is more than I can comprehend. But in truth his possession was not exclusive of the mortgagor. He held under a demise from Romanes, at an annual rent, from the 1st of March, 1866 to the 1st of March, 1872, and although the instrument contained an agreement of sale and purchase at the price of \$6,200, payable in twelve equal annual instalments, commencing on the 1st of March, 1873, his holding was not the less that of a tenant to Romanes. During that time the foreclosure proceedings were in progress, and Romanes was treated as a mortgag  e in possession, and his possession was that of the persons entitled to redeem.

The attempt to charge Allinor with the value of the improvement by making them a lien upon the land, seems to be equally unwarranted. As the decree gives ample relief to the plaintiff against the Romanes' estate for any loss he may have suffered, and as it is conceded that it is of undoubted ability to pay, this branch of the case seems to be put forward rather for the benefit of the estate, than of the plaintiff personally. It is in fact nothing else than an attempt to indirectly obtain what the Court directly refused, in the foreclosure suit.

Agreeing with the learned Vice-Chancellor as I do, in the conclusion that the plaintiff had knowledge of the defect in the title, before he made these improvements, and that he made them in reliance upon Romanes holding him harmless, I am clear that neither by the general doctrines of the Court, nor by virtue of 36 Vic. ch. 22, O., is he entitled to a lien. His learned counsel mainly relied upon 'the statute, but it is impossible to hold that he made the improvements "under the belief that the land was his own." I cannot profitably add anything to the observations of the Vice-Chancellor upon this topic.

For the disposition of this case, it is scarcely necessary to say more than that the plaintiff's title to relief must ultimately rest upon the question of his right to specific performance of his contract: that if this right were other-

wise perfect, it cannot be enforced against the Romanes estate, because its representatives are unable to make title ; or against Allinor, because with him there is no privity recognized either at law or in equity ; and that the plaintiff's position is not improved by compounding both parties in the same suit, or by starting a new and unheard of equity under the wing of the Statute of Limitations.

The appeal must be dismissed, with costs.

BURTON, PATTERSON, and MORRISON, JJ.A., concurred.

Appeal dismissed.

A DIGEST
OF
ALL THE REPORTED CASES
DECIDED IN
THE COURT OF APPEAL,

FROM MAY 9TH 1878 TO FEBRUARY 3RD 1879.

ACTION.

By judgment creditor against shareholder.]—See RAILWAYS AND RAILWAY COMPANIES, 1.

Notice of, against Division Court clerk.]—See DIVISION COURT CLERK.

See PUBLIC COMPANY.

AFFIDAVIT.

See CHATTEL MORTGAGE.

AGENT.

Fraudulent act of.]—See RAILWAYS AND RAILWAY COMPANIES, 3.

APPROPRIATION OF
PAYMENTS.

Collateral security to bank—Appropriation of payments.]—M. & Co., being desirous of obtaining additional advances from a bank, executed a mortgage to secure a large sum for which they were liable on the 31st

December, 1873, on commercial paper of the firm and its customers which had been discounted by the bank. The mortgage provided that it should continue a security for the said sum and all renewals or substitutions therefor, and all indebtedness of M. & Co. in respect thereof. After the mortgage was given, M. & Co.'s line of discount was increased, but no separate account of the liabilities secured by the mortgage and these further advances was kept, the proceeds of the discounts and cash deposits being carried to M. & Co.'s credit in one open current account, against which they drew cheques to retire the notes secured by the mortgage as they matured. M. & Co. became insolvent on the 12th August, 1875, their indebtedness in the meantime never having been reduced.

Held, affirming the judgment of BLAKE, V. C., that this mode of keeping the accounts had not operated as a discharge of the mortgage debt. *Cameron v. Kerr*, 30.

ASPORTATION.

See TROVER.

ASSESSMENT AND TAXES.

Tax sale—Description of land—Deed by new sheriff.]—The sheriff, on a sale of land for taxes in 1860, gave the purchaser a certificate of the land sold as “five acres of land to be taken from the south-west corner of the south-west quarter of lot 3, in the 11th concession of the township of East Zorra”; but made no further description thereof.

Six years afterwards, a new sheriff gave a deed, describing the land particularly by metes and bounds.

Held, affirming the judgment of the Queen's Bench, 41 U. C. R. 212, that the sale was invalid, and that therefore, no land having been sold, section 155 of 32 Vic. ch. 36, O., did not apply to validate the deed. *Burgess v. The Bank of Montreal*, 66.

ASSIGNMENT.

Of mortgage.]—See MORTGAGOR AND MORTGAGEE, 1.

ATTACHMENT.

Setting aside.]—See INSOLVENCY, 5.

BANKS.

See APPROPRIATION OF PAYMENTS.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Promissory note—Lawful holder—Discharge of surety.*]—A firm of

solicitors, in whose hands a note had been placed for suit, got the authority of the plaintiff, who was then a clerk in their office, to use his name for the purpose of the suit.

Held, reversing the judgment of the County Court, that he was the lawful holder.

The holder of a note, to which one of the defendants was a surety, accepted a new note from the principals without his knowledge or consent, on the understanding that he would not proceed on the original note which he retained, unless the fresh note was not paid at maturity.

Held, that the surety was discharged, and that there was no reservation of the remedy against him.

The fact that a party joins in a note as a surety to enable the principals to raise money to apply towards the discharge of certain obligations to him does not prevent his being a surety.

An appeal having partially succeeded and partially failed, no costs were given. *Shepley v. Hurd et al.*, 549.

2. *Promissory notes—Mortgage as collateral security—Liability—Estoppel.*]—In May, 1873, H. B. & Co., being indebted to plaintiff's bank \$60,000, B. executed a mortgage for \$40,000 as security therefor, reciting that it was for money lent on notes made by B. and endorsed by the firm, by defendant, and by Mrs. P. In October, the indebtedness having increased to \$90,000, the bank required as further security a mortgage from the defendant for \$25,000, and one from Mrs. P. for a like amount. The mortgages were similar in form, and recited that the firm's indebtedness, being for moneys previously advanced on promissory notes, made

and endorsed, as before stated, exceeded \$25,000, and that such mortgage was given as collateral security for that sum, part of said indebtedness, whether represented by the notes then under discount, or by renewals, or by substitutions therefor, and similarly made and endorsed. There was a covenant for the payment of the indebtedness represented by said notes when due, or by any renewals or substituted notes. B. had been signing defendant's and Mrs. P.'s names as endorers to the notes with their consent, as he alleged, but which defendant denied; and to prevent the bank noticing any difference between the signatures to the notes and to the mortgage, B. with defendant's assent, signed defendant's and Mrs. P.'s names to the mortgages, which they subsequently acknowledged before a witness to be their signatures. Defendant alleged that he then believed the indebtedness to be only \$60,000, being told so by B., but about three weeks after he discovered it to be \$90,000, and he then said nothing to the bank about it. After the mortgages were executed, the notes were renewed from time to time down to the insolvency of the firm in 1877, by B. writing defendant's and Mrs. P.'s names as endorers, as he stated, with their consent, but which defendant denied. The bank brought actions respectively against defendant personally, and as executor of Mrs. P., who had since died, on the covenant in the respective mortgages, and also on the endorsements. After action commenced the bank realized \$35,000 on B.'s mortgage, and \$6,300 from the firm's estate.

The jury found that defendant did not authorize B. to indorse for him, and that defendant when he gave the

mortgage supposed the debt to be only \$60,000.

Held, that the evidence shewed that each mortgage was intended to be an independent security for \$25,000; and that the finding of the jury that the defendant supposed the debt to be \$60,000 was wholly immaterial, as the mere fact that he thought it was only that amount could not, under the circumstances, relieve him from liability upon the mortgage either wholly or partially. *Merchants' Bank v. Bostwick*, 24.

BRIDGE.

Mandamus of county to build.]—*See* MANDAMUS.

BY-LAW.

Closing up road—Ingress—Egress—Compensation.]—*See* WAYS, 2—JURISDICTION, 2.

CHATTEL MORTGAGE.

Chattel mortgage—Renewal of—Statement and affidavit.]—*Held*, affirming the judgment of the County Court, that where the statement and affidavit filed upon renewal of a chattel mortgage, when read together, give all the information required by R. S. O. c. 119, sec. 10, the renewal is sufficient.

The statement was that the interest of the mortgagee in the goods described in the mortgage, of which the annexed is a true copy, and made by C., and dated the 13th of March, 1876, is as follows: The amount still due to me, S., on said mortgage for principal is, \$200. The affidavit stated that the above statement was correct and true, that the mortgage

had not been assigned by him, and was not kept on foot for any fraudulent purpose. *Held*, sufficient. *O'Halloran v. Sills*, 12 C. P. 465, remarked upon and distinguished.

The copy filed gave the date of the mortgage as the 13th March, 1877, instead of 1876. *Held*, immaterial, as the mistake could have misled no one. *Sloan v. Maughan*, 222.

COLLATERAL SECURITY.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

COLLISION.

At crossing.—*See* RAILWAYS AND RAILWAY COMPANIES, 2.

COMMON COUNTS.

Right to sue on.—*See* CONTRACT.

COMPANY.

Liability of, for fraudulent receipts issued by agent.—*See* RAILWAYS AND RAILWAY COMPANIES, 3.

See PUBLIC COMPANY.

COMPENSATION.

Under 36 Vic. ch. 48, sec. 373.—*See* JURISDICTION, 2.

For closing up road.—*See* WAYS, 2.

COMPOSITION AND DISCHARGE.

Goods obtained by fraud—Right to sue for.—*See* INSOLVENCY, 1.

Promise to pay debt barred by discharge.—*See* INSOLVENCY, 2.

By copartners.—*See* INSOLVENCY, 4.

CONDITION.

See INSURANCE, 3.

CONSENT.

Of protector to settlement.—*See* ESTATE TAIL.

CONTRACT.

Express contract—Fraud—Right to sue on common counts.—The defendant gave a note made by one K. to the plaintiffs in exchange for a buggy. The note was not paid at maturity, whereupon the plaintiffs sued the defendant on the common counts for the price, alleging that he had induced them to take the note by fraudulent representations.

Held, reversing the judgment of the County Court, that the plaintiffs could not recover, for there being an express contract to take the note for the buggy, no agreement to pay in money could be implied by reason of the alleged fraud. *Auger et al. v. Thompson*, 19.

CONVERSION.

See TROVER.

CONVICTION.

Inland Revenue Act—Conviction, return of—R. S. O. c. 76.—Section 165 of the Inland Revenue Act, 31 Vic. ch. 8, D., prescribes that "the pecuniary penalty or forfeiture incurred for any offence against the provisions of this Act, may be sued for and recovered before any two or more justices of the peace, * * and any such penalty may, if not

forthwith paid, be levied by distress.
* * or the said justices may in their discretion commit the offender to the common gaol until the penalty * * be paid."

The plaintiff, who was tried under the above Act for distilling spirits without a license, before the defendant and three other justices of the peace, and was ordered to pay \$200, sued the defendant for not making a return thereof under R. S. O. ch. 76.

Held, affirming the judgment of the County Court, that the defendant was liable, as the adjudication in question was a conviction within the meaning of R. S. O. ch. 76, and not a mere order for the payment of money. *May qui tam v. Middleton*, 207.

CORPORATIONS.

Corporation—Election of directors—Demurrer—Pleading—Statutes.]
—The Act of Incorporation of the Toronto Street Railway Company provided that there should not be less than three directors, each of whom should be a shareholder. The Corporation consisted of three shareholders, who were the directors. Upon the death of one of them a meeting was called to appoint a new director, when one S., to whom the deceased director had bequeathed his shares, was declared elected by one of the two directors, although the other refused to concur in the appointment.

Held, upon demurrer to the bill filed to declare the election invalid and for other relief, reversing the decree of PROUDFOOT, V.C., 25 Gr. 465, that no election was necessary to make S. a director, there being only three shareholders, each of whom was qualified to be a director.

Held, also, that the demurring defendants were not restricted to the statements in the bill of the Acts under which the company was incorporated, but they could refer to the statutes as printed in the statute book. *Kiely v. Kiely et al.*, 438.

COSTS.

Of appeal.—See INSURANCE, 2.

COVENANT.

In mortgage to pay the whole in default of payment by instalments.]
—See MORTGAGOR AND MORTGAGEE, 2.

To erect station.—See RAILWAYS AND RAILWAY COMPANIES, 6.

CURTESY.

Tenant by the.—See MARRIED WOMAN, 1.

DAMAGES.

Assessment of damages by the court, and entry of verdict under C. L. P. Act, R. S. O. ch. 50, sec. 287.—The plaintiff sued as personal representative of her husband, who had been killed by falling through a trap door in the floor of an office of the defendants, to recover damages under the statute (R. S. O. ch. 128). A verdict was entered for the defendants by the Judge before whom the case was tried without a jury. It was held by the Court of Queen's Bench, (34 U. C. R. 577) that the defendants were liable, and the plaintiff was entitled to a verdict; but damages not having been assessed, a new

trial was ordered. The Court of Appeal, without deciding that it would have disturbed the finding at the trial, held that no sufficient reason was shewn for reversing the decision of the Queen's Bench, which was the immediate subject of the appeal; but, held also, that the Court should have assessed the damages and entered the verdict, which in its opinion should have been entered at the trial; and accordingly assessed the damages, and varied the rule by directing a verdict to be entered for the amount. *Denny v. The Montreal Telegraph Co.*, 628.

DEED.

Construction of deed—Life estate—Trust—Reformation of deed.]—One C., a lawyer, mortgaged certain property to the plaintiffs. When searching the title to this property the plaintiffs' solicitor found that a deed, made in 1848 between C. and his mother, after reciting that C. was his father's executor, and that all the property was devised to him in trust for his mother for life, and after her decease in trust for his sisters, the defendants, and that he was indebted to the said trust fund in the sum of £1,200, and was "desirous of securing the same in accordance with the provisions of the said will," proceeded to grant the property in question "unto the said party of the second part," his mother, "forever" Upon inquiry by the plaintiffs' solicitor, C. informed him that the deed was only intended to convey a life estate to his mother, who was then dead. The plaintiffs having contracted to sell this property after C.'s death, an objection to the title was raised on account of the deed of

1848. Proceedings were thereupon taken to quiet the title, and the sisters were made claimants. No evidence was given to shew what the real agreement between the parties to the deed was. One of the claimants swore that certain payments were made to her by C. after her mother's death, but her evidence failed to establish that the rents as such were paid to her.

Held, reversing the decree of PROUDFOOT, V. C., that under the operative words of the deed a life estate merely passed, and that their effect could not be enlarged by the covenants, which were in the short form.

Held, also, that although equity has ample power to supply words of inheritance, no case was established for the reformation of the deed.

Held, also, that even if the claimants' evidence had been satisfactory, being that of one of the litigants and uncorroborated, it could not be made the foundation of a decree after C.'s death; and, moreover, the claimants were volunteers, being no parties to the agreement, if any, between C. and his mother, and having done nothing on the faith of it.

Semble, also, that the Statute of Limitations would be a bar, the trust, if any, declared by the deed, being an implied, and not an express, trust. *Trust and Loan Co. v. Clarke et al.*, 429.

Tax sale—Description of land.]—
See ASSESSMENT AND TAXES.

See FRAUDS, STATUTE OF—RAILWAYS AND RAILWAY COMPANIES, 4.

DEMURRER.

See CORPORATION.

DESCRIPTION.

Of land sold for taxes.]—See
ASSESSMENT AND TAXES.

DIRECTORS.

Election of.]—See CORPORATION.

DISTRESS.

Purchase by landlord at sale of goods—Change of possession.]—See
LANDLORD AND TENANT.

DIVISION COURT CLERK.

Action against Division Court clerk—Money had and received—Notice of action.]—The defendant, clerk of the Division Court of York, sent a transcript of the entry of a judgment recovered therein by the plaintiff to one M., the Division Court clerk of Essex, with directions to remit the money by post-office or by cheque. M. having recovered the money paid it into his private account at McG. Bros. private bankers, and sent their cheque to the defendant for the amount, as he had been accustomed to do, which the defendant acknowledged in the following words: "McLeish v. Richards, received from the D. C. clerk, Windsor, \$70.40." Before the cheque was presented McG. Bros. failed, and the plaintiff sued the defendant for the money.

Held, reversing the judgment of the County Court, that the cheque and receipt operated as payment between M. and the defendant, and that the plaintiff was entitled to recover the money from the defendant as money received to his use.

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Held, also, following Dale v. Cool, 6 C. P. 544, that no notice of action was necessary. McLeish v. Howard, 503.

ESTATE.

For life.]—See DEED.

ESTATE TAIL.

Estate tail—"Consent" of protector—R. S. O. ch. 100 sec. 31.]—The express consent of the protector to the settlement is not necessary to bar an estate tail.

The tenants in tail and the mother, who was protector to the settlement, having an estate during widowhood in the land, joined in a mortgage in fee, purporting to be made under the Act respecting short forms of mortgages, and containing the usual covenants for the purpose of securing moneys borrowed to pay off legacies charged on the whole estate, including the mother's interest therein.

Held, reversing the judgment of PROUDFOOT, V. C., that her consent sufficiently appeared, and that the estate tail was barred. Ostrom v. Palmer, 61.

ESTOPPEL.

See INSOLVENCY, 1—PARTNERSHIP.
—LIMITATIONS, STATUTE OF, 3.

EQUITABLE PLEA.

Joining issue on.]—See MORTGAGOR AND MORTGAGEE, 2.

EVIDENCE.

Of allotment of railway shares.]—See RAILWAY AND RAILWAY COMPANIES, 5.

See FRAUDS, STATUTE OF.

EXECUTION.

See MARRIED WOMAN.

FRAUD.

See CONTRACT.

FRAUDS, STATUTE OF.

Statute of Frauds—Absolute deed—Parol evidence to shew a right to redeem—Admissibility of.—The bill, which was filed in 1876, by the children and heirs-at-law of J. W. R., alleged that the deceased had, in 1861, conveyed certain real estate to his brother I. N. R., upon the express trust that he would advance him \$1,000, and hold the property as security for the repayment of that sum with interest; that he never did advance that sum; that J. W. R. died in 1872; that I. N. R. died in 1874, having devised this property to his son; that the trusts upon which it had been conveyed had been fulfilled, and sought an account of I. N. R.'s dealings therewith. The defendants, the executor and executrix of I. N. R., set up an absolute sale, and relied on the Statute of Frauds and the Statute of Limitations.

It was proved at the hearing that immediately after the execution of the deed, which was an absolute conveyance of the lands in question for \$6,000, subject to certain mortgages, I. N. R. had gone into possession; that parties applying to J. W. R. for the purchase of lots were told by him that he had sold the property to I. N. R. C. R., a son of J. W. R., swore that his father being in difficulties in 1861, I. N. R. told him (C. R.) that he would take an

assignment of the property, pay off certain mortgages thereon, advance J. W. R. \$1,000. and reconvey it at any time on payment of advances and interest. In a letter to C. R. in 1865. J. W. R. said that in writing to I. N. R., he had denied that "the sale was in any other light than that in which you placed it. * * I also asked him if he is willing to relinquish the property on receiving his advances." An account rendered by I. N. R. was produced, dated September 16, 1863, headed, "J. W. R., Debtor. Amounts paid for you," composed of items which, it was alleged, formed the purchase money of the premises in question. On the 23rd February, 1865, I. N. R. wrote to J. W. R. in reply to a letter from him, 'Pay me my advances as agreed with C., and you can have your property.' PROUDFOOT, V.C., made a decree directing an account, and allowing the plaintiffs to redeem the lands on payment of the amount due to the defendants in respect of advances made.

Held, BLAKE, V.C., dissenting, that the evidence, which is more fully set out below, shewed that the transaction was a sale, and the decree was reversed.

BLAKE, V.C.—Although under all the circumstances he would, on the evidence, have formed a conclusion adverse to the plaintiffs, yet, held, that parol evidence was admissible, and he was not prepared to decide against the judgment of the Vice-Chancellor, who was placed in a so much more advantageous position for determining the weight to be attached to the evidence.

Per PATTERSON, J.A., that oral evidence was not admissible to vary the deed.

Per BURTON, J.A., the evidence of C. required corroboration under

36 Vic. ch. 10, and was not corroborated in any material particular. *Rose et al. v. Hickey et al.*, 309.

This case has been argued before the Supreme Court, and stands for Judgment.

Agreement by correspondence—Parol evidence.]—See SALE OF GOODS.

HIGHWAY.

Evidence of non-repair.]—See MUNICIPAL CORPORATIONS.

See WAYS.

HOLDER.

Lawful, of promissory note.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.

IMPROVEMENTS.

Lien for.]—See SPECIFIC PERFORMANCE.

INLAND REVENUE.

Right to sue in Court of Chancery for excise duties.]—See JURISDICTION, 1.

Return of conviction under.]—See CONVICTION.

INSOLVENCY.

1. *Insolvent Act of 1875—Deed of composition and discharge—Estoppel.*]—The plaintiff sued the defendant, an insolvent, who had obtained his discharge under a deed of composition and discharge, for a debt alleged to have been contracted under such circumstances that the imprisonment of the debtor for enforcing payment is permitted by sec. 136 of the Insolvent Act, 1875.

Held, reversing the judgment of the Queen's Bench, 42 U. C. R. 409, that the plaintiffs had not precluded

themselves from enforcing the claim by having proved it in the ordinary way, and not as a debt contracted by fraud; or by having taken notes made by the defendant and his sureties for the composition, and received payment of one of them.

The term "dividend from the estate" in sec. 63, includes a payment under a deed of composition and discharge. *McMaster et al. v. King*, 106.

2. *Insolvent Act, 1875—Debt barred by discharge—Promise to pay.*]—*Held*, reversing the judgment of the County Court, that a promise to pay a debt from which a discharge under the Insolvent Act of 1869, had been obtained, is founded on a good consideration, and may be enforced. *Adams v. Woodland et al.*, 213.

3. *Insolvency—Right to security—Ex parte Waring.*]—M. borrowed \$1,500 from M. & Co., giving them as security a chattel mortgage, and his promissory note at three months, which they discounted at Molson's Bank. No assignment of the mortgage was ever made to the Bank, nor did they deal with M. & Co., in reliance on it. When the note became due, M. & Co. paid \$600, and renewed for \$900. Shortly afterwards, both M. and M. & Co. became insolvent, and the bank claimed the benefit of the mortgage.

Held, affirming the judgment of the County Court, that the bank was not entitled to a prior claim upon the security over the assignee of M. & Co., in respect of the \$600, and that the rule in *Ex parte Waring* gave them no assistance. *In re Morton—Molson's Bank v. MacCrae*, 202.

4. *Insolvent Act of 1875—Deed of composition by co-partners—Requisite number and proportion of*

value.]—Where there are joint and separate creditors, a deed of composition and discharge, although providing for all the creditors and dealing with all the estates, is invalid under the 56th section of the Insolvent Act of 1875 unless the assent of the requisite proportion of the creditors of each class, joint and separate, is obtained.

Code and Crain became insolvents as a firm and individually. As co-partners they were indebted to 25 creditors. Claims to a large amount were proved against Crain individually by 29 of his separate creditors. No separate creditor of Code proved against him individually. A deed of composition and discharge, providing for a cash payment of two cents on the dollar, in full of claims against the insolvents, whether as partners or as individuals, was signed by a majority of the whole body of creditors, taking those who proved claims against the joint estate and against the separate estate as one class. These signing creditors also represented three-fourths of the claims proved against the joint and separate estates. The deed was also signed by a majority in number of the separate creditors of Crain. representing three-fourths of all claims proved against him individually. But the deed was not signed by a majority in number, or by representatives of three-fourths in value of the creditors who had proved against the firm.

Held, reversing the judgment of the County Court, that the deed of composition and discharge could not be confirmed, as the insolvents had not obtained, within the meaning of the Insolvent Act of 1875, the assent of the proportion of their creditors in number and value required by law. *In re Code and Crain*, 555.

5. *Insolvent Act, 1875, sec. 18—Setting aside attachment—Delay in moving—Partnership—Acceptance by new firm of old debt.*]—A writ of attachment issued against R. & Co. on an acceptance in the name of the firm given for a debt contracted before G. became a member thereof. A bill of exchange for this debt had been accepted in the firm's name after G. joined it, in consideration of which an extension of time was given, and it passed through the books, and was never repudiated by G. This acceptance matured after G. had retired from the firm, (which change, however, was not registered in compliance with R. S. O. ch. 123), and being unpaid, the acceptance upon which the writ of attachment issued was given. Seven weeks after the writ of attachment had been served upon him, G. moved to set it aside, accounting for his delay on the ground that the solicitor whom he had instructed to move had been called away by urgent business.

Held, affirming the judgment of County Court Judge, without deciding whether such an application can be made after the five days prescribed by sec. 18 of the Insolvent Act of 1875, that the appeal could not be entertained, for that the delay was not sufficiently accounted for.

Held, also, that G. was clearly liable to the attaching creditors on this acceptance. *Ex parte Griffin—In re Rankin*, 1.

INSURANCE.

1. *Mutual insurance policy—Assignment to mortgagee—Subsequent insurance by mortgagor.*]—*Held*, reversing the judgment of the Queen's Bench, 14 U. C. R. 220, that where

a mortgagee takes a transfer of a policy under the latter part of section 39 of 36 Vic., ch. 44. O., by way of additional security, the policy continues to be voidable by the acts of the mortgagor.

Held, also, that making a mortgage is an alienation within the meaning of that section, and a mortgagee may therefore avail himself of the power of novation accorded to alienees in general by taking the steps pointed out in the second paragraph of the above section, in which case he acquires a separate independent interest under the contract, and the policy will not be avoided by the acts of the mortgagor. *Mechanics' Building and Savings Society v. Gore District Mutual Fire Ins. Co.* 151.

2. *Life insurance—Personal injury not communicated—Attendance by physician—Power of Court to enter verdict—Costs of appeal.*—One M. obtained a policy of insurance on his life, issued and accepted on the conditions therein set out, one of which was that the answers in the application, which was made a part of the contract, were warranted by the assured to be true in all respects, and that if the policy had been obtained by any misrepresentation or concealment, it should be void. Among the questions and answers in the application were: No. 8. Have you had any other illness, local disease, or personal injury, and if so of what nature? How long since? What effect on general health? Answer. No. No. 14. How long since you were attended by a physician? For what disease? Give name and residence of such physician? Answer. About thirty years ago. Lake fever. Dr. S. of, &c., now dead. Name and address of your medical attendant? Answer.

Dr. B., who attends my family. Has known me for seven years, No. 16. Have you reviewed the answers to the above questions, and are you sure they are correct? Answer. Yes. At the end was a declaration and warranty that the above were fair and true answers to the questions, and an agreement that if there should be in any of the answers any untrue or evasive statements, or any misrepresentation or concealment of facts, the policy should be void.

The evidence shewed that about fourteen or fifteen years before the deceased had been thrown out of a sleigh, and fallen on his head; that there was a depression and loss of part of his skull; that the fall had not affected his general health; that his last illness had occurred soon after a blow upon his head, received by striking against a bolt in his warehouse, close to the depression in his skull; that he was a reckless rider, getting frequent falls; and that during the last ten years he had been attended by other physicians besides Dr. B. above mentioned.

The jury, in answer to questions, found that the insured had no personal injury which must have been present to his mind as coming fairly within the term personal injury: that he had no serious or severe personal injury, which through forgetfulness or inadvertence he did not communicate, nor any personal injury which he might fairly be expected to communicate for the defendant's information, or which had any effect on his general health; and that he had not been attended by any other physician besides Dr. B., except for some trifling ailment.

Held, by PATTERSON, J.A., and BLAKE, V.C., that the answer to the eighth question was a breach of the warranty, as the evidence clearly

shewed that the injury arose from a fracture of the skull, which was produced by the fall from the sleigh, and the assured was bound to mention an injury so severe and unusual, whether it affected his general health or not.

Per BURTON, J. A., taking into consideration the finding of the jury, the personal injury in question was not within the warranty.

Per GALT, J., that it was a matter of doubt on the evidence whether the depression in the skull arose from natural causes or from the fall, and it must be assumed from the answers of the jury to the questions put to them that they adopted the former view, and so there was no breach of the warranty.

Per BURTON, PATTERSON, J. J. A., and GALT, J., that the answer to the 14th question was not a breach of the warranty, as the question was an ambiguous one, and might fairly have been interpreted by the assured as an enquiry as to the first occasion of his having to seek the services of a physician.

Per GALT, J., and BLAKE, V. C., that if the Court below thought that the jury had answered the questions contrary to the evidence they should have ordered a new trial, but could not enter a verdict for the defendants.

The Court being equally divided, the appeal was dismissed, but without costs, one member of the Court, BLAKE, V. C., who was against the plaintiff on the merits, being of opinion there should have been a new trial. *Moore v. The Connecticut Mutual Life Ins. Co.*, 230.

This case has been argued before the Supreme Court, and stands for Judgment.;

3. *Fire insurance — Condition—Warranty.*—The plaintiff, who resided at a distance from a mill on which he held a mechanic's lien, ap-

plied to the agent of the defendants to effect an insurance thereon. One of the questions put to the applicant was, "Is a watch kept on the premises during the night? Is any other duty required of the watchman than watching for the safety of the premises? Is the building left alone at any time after the watchman goes off duty in the morning till he returns to his charge at night?" His answer was, "The building is never left alone, there being always a watchman left in the building when not running." At the foot of the application was a condition that the foregoing was a full and true exposition of all the facts and circumstances in regard to the condition, situation, and value of the property, so far as was known to the applicant, and material to the risk. The policy which issued thereon mentioned the application in these terms, "Special reference being made to the assured's application, which is his warranty and a part hereof." One of the conditions of the policy provided that any changes material to the risk and within the control or knowledge of the insured should avoid the policy unless notified to the company. When the application was made, a watchman was kept on the premises, but after the issue of the policy, and without the knowledge of the assured, he was discontinued.

Held, (affirming the decree of PROUDFOOT, V. C., 25 Gr. 282,) that the answer was not a warranty that a watchman would be kept during the existence of the policy, but merely a representation as to an existing state of things at the date of the application.

Held, also, that even if the withdrawal of the watchman was a change material to the risk, the assured was not responsible, as it was not within

his control or knowledge. *Worswick v. The Canada Fire and Marine Ins. Co.*, 487.

INTERPLEADER.

Interpleader—New trial after payment of money by sheriff.—The execution creditor declining to admit the *bona fides* of a mortgage under which the property in question was claimed, an issue was directed by the Court of Chancery, and was drawn up for trial before the County Court Judge. At the trial the good faith of the claimant was admitted, and the attack on the mortgage was confined to points of law, when a formal verdict was entered for the claimant, which was afterwards set aside in term by the County Court Judge, and a verdict entered for the execution creditor. The execution creditor, thereupon, applied to the Referee in Chambers for the usual order to enable him to obtain the money, which was opposed on the ground that the Court of Queen's Bench had since decided against similar objections to this mortgage, (42 U. C. R. 329), but the Referee made the order as asked and directed the money to be paid to the execution creditor. An appeal against this order was dismissed by the Court of Chancery on rehearing, but the claimant had leave to apply within a month for a new trial of the issue before a jury, which was subsequently granted; but before the order was made the sheriff, with whom the money remained, had paid it over in accordance with the order of the Referee.

Held, reversing the order of the Court of Chancery, that the Court had no jurisdiction in the matter after the payment over of the money.

Per PATTERSON, J.A.—In the absence of an express direction by the Court of Chancery, an interpleader issue sent from that Court may be tried before a Judge without a jury. *Wilson v. Wilson*, 400.

ISSUE.

Joining issue on equitable plea.—See MORTGAGOR AND MORTGAGEE, 2.

JUDGMENT.

Form of.—See MARRIED WOMAN, 2.

Action on—Statute of Limitations.—See LIMITATIONS, STATUTE OF, 1.

JURISDICTION.

1. *Inland Revenue Act*, 31 V. c. 8, D.—*Excise Duties—Jurisdiction of the Court of Chancery.*—Sec. 155 of 31 Vic. c. 8, D., enacts that all duties of excise payable under the Act, “shall be recoverable, * * as a debt due to Her Majesty, in any Court of competent civil jurisdiction;” and sec. 32 of the A. J. Act, 1873, provides that “no objection shall be allowed on demurrer or upon the hearing of any cause in the Court of Chancery, upon the ground that the subject-matter of the suit * * is exclusively or properly cognizable in a Court of law.”

Held, affirming the decree of the Court of Chancery, 25 Gr. 233, without determining whether the A. J. Act extends to Crown cases generally, that under the above sections the Attorney-General is entitled to sue in the Court of Chancery for the recovery of excise duties, even if it be a purely legal debt.

Held, also, that secs. 43 and 44 of the 31 Vic. ch. 8, D., do not restrict the right of the Crown to sue in respect of frauds committed upon the revenue to the period of one year, or prevent a recovery in a Court of law, unless a special investigation has been held in pursuance of the Act. *The Attorney-General v. Walker*, 195.

2. *By-law closing a road—Validity of—Jurisdiction to test—Omission to provide ingress and egress—36 Vic. ch. 48, secs. 373, 422, O.*—Although the Court of Chancery has power to restrain the enforcement of a by-law of doubtful validity until the applicant has had an opportunity to move in a Court of Common Law to quash it, it has no general jurisdiction to test its legal validity.

The omission in a by-law which closes up a road to provide to the lands abutting thereon some other convenient road or way of access, under sec. 422 of the Municipal Act of 1873, does not render it void, but only subject to be quashed upon application to one of the Superior Courts of Common Law within a year.

Where, therefore, a bill was filed three years after the passing of such a by-law seeking to have it declared invalid, and asking for compensation:

Held, reversing the decree of BLAKE, V.C., that the Court of Chancery had no power to interfere.

Held, also, that under section 373 the only mode of fixing the compensation was by arbitration.

At the hearing it was agreed that the corporation should keep open two rods of the old road at the north-west corner of the plaintiff's land as part of the public road, and that the plaintiff's claim to have the whole road kept open should drop; where-

upon a decree was made perpetually enjoining the defendants from closing up the two roads.

Held, that the consent could not give power to make such a decree, for under the statute the corporation could not thus deprive itself of the power to close up such road, if the public interest should so require. *Vandecar v. The Corporation of East Oxford*, 131.

LAND.

Sale of, for taxes.—See ASSESSMENT AND TAXES.

LANDLORD AND TENANT.

Distress—Purchase by landlord—Sale of goods—Change of possession—Practice in Appeal.—The plaintiff caused the goods in question to be distrained for rent in arrear of a farm, and after an unsuccessful attempt by the bailiff to sell them, they were sold with the tenants' consent to the plaintiff, and one P. was put in charge, who, however, allowed the tenants to remain in possession as before. Subsequently the goods were seized and sold by the sheriff under executions against the tenants, whereupon the plaintiff brought trover.

Held, affirming the judgment of the Common Pleas, 28 C. P. 263, that he could not, as landlord, claim as purchaser at the bailiff's sale; nor could he claim as vendee of the tenants, it appearing that there was no registered bill of sale, nor any actual or continued change of possession.

It was urged in appeal for the first time, that some of the goods be-

longed to one of the tenants, and that the sheriff seized before he had any execution against him. *Held*, that the evidence failed to shew such seizure: and *Quære*, whether the objection should be permitted at this stage. *Burnham v. Waddell*, 288.

LIEN.

For improvements.]—See SPECIFIC PERFORMANCE.

LIMITATIONS, STATUTE OF.

1. *Action on judgment—Limitation*—38 Vic. ch. 16, sec. 11, O.]—*Held*, reversing the judgment of Gwynne, J., 28 C. P. 506, that sec. 11 of 38 Vic. ch. 16, O., does not apply to judgments; and an action may still be brought thereon within twenty years, under C. S. U. C. ch. 78, sec. 7. *Boice v. O'Loane*, 167.

2. *R. W. Co.—Negligence—Limitation of action*—C. S. C. ch. 66, sec. 83.]—The plaintiff sued the defendants for an injury sustained by him while engaged in his lawful occupation on the street, by the defendants' car being so carelessly and rapidly driven that he was obliged to jump into a drain to save himself, and was hurt.

Held, reversing the decision of the County Court, that the 83rd section of C. S. C. ch. 66, applied to a suit of this nature, and that the action should have been brought within six months.

Auger v. Ontario, &c., R. W. Co., 9 C. P. 169, and *Browne v. Brockville and Ottawa R. W. Co.*, 20 U. C. R. 202, followed.

Moss, C.J.A., and BURTON, J.A.,
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but for these decisions would have held the above section did not apply.

Per PATTERSON, J. A.—The case was clearly within the section, as the injury was sustained by "reason of the railway."

The appeal being allowed upon authorities not brought to the attention of the Court below, no costs were given. *Kelly v. Ottawa Street R. W. Co.*, 616.

3. *Ejectment—Statute of Limitations—Estoppel.*]—The plaintiff left his wife and home more than thirty years ago, and went to the United States, where he remained until a short time before this action. He held no communication with his wife or friends while absent, and was, until his return, believed to be dead. Several years after his departure, his wife acting on this belief, married again and lived with her new husband Davidson, on plaintiff's farm. They both mortgaged the farm to a building society which sold it under a power of sale in the mortgage. On his return the plaintiff brought ejectment against the purchaser from the company.

Held, affirming the judgment of the Queen's Bench, 43 U. C. R. 306, that he was not estopped by his conduct from claiming the land, and that he was not barred by the Statute of Limitations, as the possession of his wife was his possession.

The second marriage was illegal, and the possession of Davidson along with the wife, was no more than if he was her bailiff, or working the farm with her on shares. *McArthur v. Egleson*, 577.

See SPECIFIC PERFORMANCE.

MANDAMUS.

County Council—Obligation to build a bridge—Mandamus—36 Vic. ch. 48, sec. 413.—Section 413 of the Municipal Act of 1873, as amended by 37 Vic. ch. 16, sec. 19, O, enacts that “it shall be the duty of county councils to erect and maintain bridges over rivers forming or crossing boundary lines between two municipalities within the county ”

A bridge over the Grand River, which runs between the townships of Oneida and Seneca, erected at the village of York by a private company, having become out of repair, was abandoned by the company. A distance of twelve miles was thus left without any bridge, and a mandamus was applied for to compel the county council to build a bridge at or near the village of York. Contradictory affidavits were filed as to the necessity of such a bridge.

Held, reversing the judgment of the Queen's Bench, 41 U. C. R. 381, that as there were other bridges over the river, the question whether a bridge should be erected at this particular spot was a matter within the discretion of the county council, with which the Court should not interfere. *Brooks v. Corporation of Haldimand*, 73.

MARRIED WOMAN.

1. *Married woman—Tenant by the curtesy—35 Vic. ch. 16, O.*—*Held*, PATTERSON, J. A., dissenting, reversing the judgment of the County Court, that under 35 Vic. ch. 16, O., a husband was not deprived of an estate by the curtesy in any lands of his wife which she had not disposed of *inter vivos* or by will. *Furness v. Mitchell*, 510.

2. *Married woman—Separate estate—Form of judgment—Execution—35 Vic. ch. 16, O.*—In 1852, the defendant C. A. L. became entitled as one of her father's heirs-at-law to a share in certain real estate, and she was married in 1854, without a marriage settlement. This property, which was never taken possession of either by her or her husband, was afterwards sold under a decree for the purpose of making partition. While the purchase money was in Court, to part of which she was entitled, C. A. L., at her husband's request, joined him in making a promissory note to the plaintiff for groceries supplied to her husband, intending to pay it out of the money in Court.

Held, affirming the judgment of the County Court, that the plaintiff was entitled to recover.

Per PATTERSON, J. A.—The personal property enjoyed by a married woman under the statutes of 1859 and 1872, is her separate property at law, to the same extent and with the same incidents as property settled to her separate use was and is in equity.

A promissory note made by a married woman for a debt of her husband is not a debt binding upon her personally either at Common Law or under the Statutes.

She may convey or charge her separate personal estate as a *feme sole* might do.

A promissory note or other general engagement derives no efficacy, as a charge or conveyance, from any thing in the Statutes, and therefore has no effect except in equity.

When a married woman who has separate property contracts a debt, she is deemed in equity to have contracted it with reference to her separate property, and intending that it shall be paid out of that property,

and if she had power to dispose of that property, equity will make it liable for payment of the debt.

The property so made liable must be property with reference to which she may be supposed to have contracted, and therefore must be property to which she is entitled when the debt is incurred.

Semble, that the above propositions apply equally to real property coming under the Act of 1872.

Form of judgment given, and remarks as to the nature of the execution.

Royal Canadian Bank v. Mitchell, 14 Gr. 412, commented upon. *Lawson v. Laidlaw et ux.*, 77.

3. *Married woman—Separate estate*—35 Vic. ch. 16, O.]—The defendant, who was married in 1852, was by virtue of her marriage settlement entitled to the legal estate for life in certain lands after the death of her husband, and during his life endorsed a promissory note made by him to secure his liability to the plaintiffs. The land had been conveyed, but ineffectually, by the trustee under the settlement to one B, and the defendant signed with her husband a declaration that such conveyance was made at their request, to enable B. to sell the land and out of the proceeds to pay first the husband's debt to the plaintiffs. B. also wrote to the plaintiffs saying that the proceeds of any sales should be so applied. A decree having been made by BLAKE, V.C., against the defendant after her husband's death to realize the amount out of such land :

Held, that such decree must be reversed, for the property in question was not her separate estate within the meaning of 35 Vic. ch. 16, sec. 1, O. *Standard Bank v. Boulton*, 93.

MISDIRECTION.

See MUNICIPAL CORPORATIONS.

MONEY HAD AND RECEIVED.

Action for.]—*See* DIVISION COURT CLERK.

MORTGAGE.

As collateral security.]—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

MORTGAGOR AND MORTGAGEE.

1. *Assignee of mortgage—Right of set-off.*]—A purchaser who had taken a conveyance and given a mortgage for the purchase money had been compelled to pay off a prior mortgage, under threat of proceedings being taken against the land by the prior mortgagee. The purchaser had taken a covenant from the vendor for the discharge of this prior mortgage.

Held, reversing the decision of HARRISON, C.J., sitting alone, and over-ruling *Henderson v. Brown*, 18 Gr. 79, that as against an assignee of the mortgage made by the purchaser with notice of these facts, the purchaser has no equity to set-off or deduct from the mortgage assigned what he has paid on the first mortgage, subsequent to the assignment. *Egleson v. Howe*, 566.

2. *Mortgage payable by instalments—Covenant to pay the whole on default—Equitable plea—Effect of joining issue thereon.*]—Upon default

in payment of an instalment in a mortgage, the mortgagees sued for the whole amount of the mortgage money. The mortgage purported to be under the Act respecting short forms of mortgages, 27 & 28 Vic. ch. 31, but number 16 of the second schedule was omitted; and it contained a covenant (not following the statutory form) that on default in the payment of any one instalment or any part thereof, the whole unpaid principal and interest should immediately become due, and that he (the mortgagor) would pay the same forthwith should the mortgagees so require, without demand.

The defendant paid into Court the amount actually due for the instalment of principal and interest, and pleaded, on equitable grounds, that the residue, \$12,500, was the balance of the purchase money of land bought by him from the plaintiffs for \$14,000, of which defendant had paid \$1,500; and that the sum claimed above that paid into Court was claimed only by way of forfeiture for the default; and he prayed for relief from such forfeiture and for a stay of proceedings. Upon this plea issue was joined; and at the trial the mortgage was put in and all the facts alleged in the plea were proved.

Held, in the Court of Queen's Bench, WILSON, J., dissenting, that such relief might be granted under G. O. 461, which is not confined to suits for foreclosure, and a verdict was entered for defendant.

Held, in this Court, affirming that judgment without deciding whether G. O. 461, applied to suits for redemption or entitled the defendant to relief in an action at law on the mortgage—that the defendant was entitled to succeed, on the ground that the equitable plea, upon which the plaintiffs had chosen to join

issue, had been proved, and no amendment having been asked for, the defendant was strictly entitled to a verdict.

Remarks as to the lax system of pleading frequently adopted in joining issue, when the question is really one of law.

Quære, per Moss, C. J., whether the Court of Chancery has power to grant relief in such a case, either by virtue of G. O. 461, or its inherent jurisdiction to relieve against penalties or forfeitures. *Tylee et al. v. Hinton*, 53.

See INSURANCE, 1.

MUNICIPAL ACTS.

Construction of.—*See* WAYS, 1.

MUNICIPAL CORPORATIONS.

Highway—Want of repair—Misdirection—36 Vic. ch. 48, sec. 409.]—The plaintiff's husband lost his life by falling with his horse and sleigh into a ditch or drain, alongside of a highway in the township of Moore, on which deceased was driving at night. The ditch was about 12 feet deep and 32 feet wide extending about half way into the travelled road which was thus reduced to 30 feet in width. The road had been in this state for some years, but it appeared to serve the purpose of the neighbourhood as a highway. There was no railing or other guard at the ditch, and nothing to indicate the situation on a dark night, such as the night in question was. It was alleged that the deceased was under the influence of liquor; but there was no direct evidence as to how he fell into the ditch.

The learned Judge, at the trial, told the jury that if the defendants were indicted for having the road in the position described they would be directed to find them guilty of having the road out of repair. He also told them that where a ditch became such a deep and dangerous place as this, the corporation were bound to put a guard on it, otherwise as a matter of law they were guilty of neglect in not guarding it, but he proceeded to say: "It is a matter entirely for you. Was that road in such a reasonable state of repair that it was safe for persons passing and re-passing at all times night and day? If so, you will find a verdict for the defendants."

Held, reversing the judgment of the Queen's Bench, 43 U. C. R. 334, that the remarks above referred to were more than a strong comment on the evidence, and that there was clearly misdirection, as it was impossible to say as a matter of law that the statutory duty to keep the road in repair had been neglected by the existence and continuance of the ditch or by its being without a guard; that being a deduction of fact to be made by a jury upon a consideration of all the circumstances.

Held, also, that the obligation expressed by the words "keep in repair," as used in 36 Vic. ch. 48, sec. 409. O., is satisfied by keeping the road in such a state of repair as is reasonably safe and sufficient for the requirements of the particular locality; and that there was non-direction in the attention of the jury not being called to the duty of modifying the force of the word "repair" by reference to the surrounding conditions. *Lucas v. Corporation of the Township of Moore*, 602.

NEGLIGENCE.

Proof of.] — See RAILWAY AND RAILWAY COMPANIES, 2.

Of railway company.]—See LIMITATIONS, STATUTE OF.

NEW TRIAL.

In interpleader issue after payment of money by sheriff.]—See INTERPLEADER.

NOTICE.

Of action against Division Court clerk.]—See DIVISION COURT CLERK.

PARTNERSHIP.

Partnership — Sale of chattel — Notice—Estoppel.] — In 1867 the defendant S. entered into an agreement with the plaintiff for an advance of money to enable him to perform a stipulation in a lease made to him a short time before for the period of seven years by the Rossin House Hotel Company, that he would expend \$10,000 in providing furniture, &c., for the hotel. The agreement was as follows: "Said E. D. C. agrees to advance the money necessary to open the Rossin House in Toronto, not exceeding the sum of \$10,000, and G. P. S. to pay interest on one-half the amount till repaid to E. D. C., and each party to share equally in all profits, articles of furniture, supplies, &c., put in the said house, and E. D. C. to have a chattel mortgage on everything belonging to both parties, until the half of all the money advanced is repaid to E.

D. C., signed, G. P. Shears." After the expiration of the term there were negotiations between the plaintiff and S. for a settlement, in the course of which the latter rendered statements to the plaintiff, in which he assigned a value to the furniture and treated it as an asset belonging to them jointly. After these negotiations S. continued to carry on the business of the hotel without any dissent by the plaintiff, under a new lease which had been granted to him by the Hotel Company before the expiration of the original term. In 1875, S. becoming embarrassed, a new arrangement was concluded between him and the company, by which he surrendered the old lease and obtained a new one for the term of ten years; and in consideration of an advance of money and arrears of rent, he executed a bill of sale to the company of the furniture. The lease contained a stipulation that on certain conditions being performed the furniture should at the end of the term belong to S. Subsequently S. assigned the lease to one I., who had actual notice of the plaintiff's interest in the furniture. Evidence was given to prove that the company had notice of the relation existing between S. and the plaintiff in reference to this furniture. There was no evidence to shew that the plaintiff knew of this transaction until after it was consummated, when he promptly repudiated it.

Held, reversing the decree of BLAKE, V. C., that there being a partnership between plaintiff and S., and they being joint owners of the furniture, S. had no power to sell and convey the plaintiff's interest therein.

Held, also, that the plaintiff was not estopped by simply remaining passive from asserting his right to

the furniture, and that he was entitled to a lien for any balance that might be due to him on the accounts being taken. *Crossman v. Shears et al.*, 583.

See INSOLVENCY, 5.

PARTITION.

Partition—Water mill privilege.]—The plaintiff filed her bill for a partition of 200 acres of land on the river Ottawa and a water mill privilege appurtenant thereto. The property in question had been acquired by her and one A. H. as tenants in common, and A. H. had subsequently conveyed an undivided one-fifth of his portion to the other four defendants. The evidence shewed that in order to divide the water privilege very complicated structures would have to be made at heavy expense, and a large sum of money expended annually in maintaining them. It also appeared that the difficulties in carrying out the scheme would be very great.

Held, affirming the judgment of SPRAGGE, C., that it was the duty of the Court to consider the interests of all the defendants, and a partition could not be decreed without injuring them; but that even if the case were decided without reference to the interests of the defendants other than A. H., partition was under the circumstances rightly refused; and a sale of the water privilege, together with a sufficient quantity of land for the purpose was ordered. *Blasdell v. Baldwin et al.*, 6.

PERSONAL INJURY.

See INSURANCE, 2.

PHYSICIAN.

Attendance by.]—See INSURANCE, 2.

PLEADING.

See CORPORATIONS.

PRACTICE IN APPEAL.

See LANDLORD AND TENANT.

PREFERENCE.

Fraudulent.]—*See* WAREHOUSE RECEIPTS.

PROTECTOR.

Consent of.]—*See* ESTATE TAIL.

PUBLIC COMPANY.

“*The (Imperial) Companies' Act, 1862*”—*Order making calls against past member—Right of action thereon.*]—The plaintiffs, a company formed and registered in England under the Companies' Act, 1862, which was being wound up, sued the defendant who was a past member, placed on the list of contributories, for the amount of certain calls which he was ordered by the Court of Chancery in England to pay to one of the two official liquidators appointed.

Held, GALT, J., dissenting, reversing the judgment of the Queen's Bench, 40 U. C. R. 435, that the liability of the defendant to pay the calls was a debt, which originated at the time he became a holder of the

shares, and that the plaintiffs were entitled to sue him here for the recovery thereof. *Barned's Banking Co. v. Reynolds*, 371.

This case has been argued before the Supreme Court, and stands for judgment.

RAILWAYS AND RAILWAY COMPANIES.

1. *Action by creditor against shareholder—Proof of defendant being a shareholder.*]—The plaintiff, a creditor of a railway company, sued the defendant as a shareholder for the amount unpaid on his shares. It appeared that the defendant had signed the stock book of the company for forty shares, but he alleged that this was done upon the faith of a verbal agreement with one L., a provisional director and chief promoter of the company, that defendant and another should receive the contract for building the road. There was no proof that the defendant had received any formal notice of the allotment of the shares, but he paid 10 per cent. thereon, because, as he alleged, L. told him that he would not get the contract unless he paid it. He also attended a meeting of the shareholders, and seconded a resolution granting an allowance to the directors.

Held, affirming the judgment of the County Court, that the payment of the 10 per cent. made him a shareholder, and that he could not repudiate his liability on the ground that he had not been awarded the contract, for L. had no power to bind the company by annexing such an agreement to his subscription. *Wilson v. Ginty*, 124.

2. *R. W. Co.—Collision at crossing—Proof of negligence—R. S. O.*

ch. 165, sec. 21.]—The defendants were empowered by the corporation of the city of Hamilton to run their railway along Ferguson avenue in that city. The plaintiff, who was driving along Barton street, which crosses Ferguson avenue on a level, found a freight train across the street facing southward, and stopped his horse about 150 feet from it. Presently a pilot engine came down to the head of the train to assist it up the grade to the south, but immediately upon its arrival it was found that firewood was required for its use, and the train at once moved to the north to allow the pilot engine to go to the woodshed, which was situated to the north of Barton street. The train had moved only to the other side of Barton street, about 15 or 20 feet, when the plaintiff attempted to cross, but the horse shied at the pilot engine, which had remained stationary, and the plaintiff was thrown out and injured.

Held, reversing the judgment of the Queen's Bench, that there was no evidence of negligence which should have been submitted to the jury, and a nonsuit was ordered.

Held, also, that under R. S. O., ch. 165, sec. 21, the corporation of the city of Hamilton had clearly power to allow the defendants to run their railway along Ferguson avenue. *Howe v. The Hamilton and North-Western R. W. Co.*, 336.

3. *R. W. Co.—Shipping receipts—Fraudulent receipts issued by agent—Liability of company.*—The agent of defendants at Chatham, a station on their line, having authority to grant bills of lading and shipping receipts for goods to be forwarded by the railway from that station, issued such documents representing certain flour to have been shipped by or

received from B. & Co., and to be delivered to the plaintiffs at St. John, N.B. B. & Co. were a firm of millers at Chatham, of which the defendants' agent was a partner, and these bills of lading and receipts were fraudulently issued by him, no flour having been received. Bills of exchange drawn by B. & Co. on the plaintiffs, and annexed to these bills of lading and receipts, were discounted by a bank at Chatham, and forwarded to the plaintiffs, by whom they were accepted and retired.

Held, by Moss, C.J.A., and BURTON, J.A., that the defendants were not liable to the plaintiffs, as the agent in giving receipts for goods never received, was not acting within the scope of his authority and employment, and for their benefit.

Held, by PATTERSON, J.A., and BLAKE, V.C., that the defendants were liable, as under the circumstances, they must be presumed to know the purpose for which such documents were intended to be used, and were estopped as against the plaintiffs, who had acted on them, from denying the representations contained therein.

Per Moss, C.J.A., and BURTON, J.A., a principal is only liable for the tort of an agent, where the misrepresentation is made, or other wrongful act is committed by the agent in the usual course of his employment, or within the scope of his agency, and for the benefit of his principal, or where the principal has authorized, sanctioned, or ratified it.

Per BURTON, J.A., bills of lading are not intended as a representation to the public that they may safely advance their money upon them, but are mere contracts between the carrier and the shipper.

Per PATTERSON, J.A., bills of lading are not only intended as an assurance

to the shipper, but as a representation to the "banker or private person" with whom the statute deals, and they may act on the faith of it, and advance their money. *Erb et al. v. Great Western R. W. Co.*, 446.

This case has been argued before the Supreme Court, and stands for judgment.

4. *Railway terminus—Land conveyed on condition.*—The plaintiff, on the representation of parties that they had given land to the defendants for the purpose of having the terminus of their railway at Windsor, conveyed lot 83 to the defendants in 1847, expressing in the conveyance that the same had been selected by the company "for the purpose of establishing the western terminus of their road thereon, * * and the execution of which condition constituted the sole consideration for this grant." When the plaintiff made this deed he knew that one H. had conveyed the adjoining lot 84 to the defendants on substantially the same condition. In 1853, the defendants built a passenger station on lot 83, and a freight house partly on lots 83 and 84, which were destroyed by fire, and a passenger station was afterwards built on lots 83 and 84, and a freight station on lot 84, which the defendants continued to use until recently, when they built a passenger station about half a mile from the original one. The bill alleged that the western terminus had been removed to the city of Detroit, and sought to restrain such removal from the land in question. It appeared that instead of unloading the passengers and freight in Windsor, the cars were carried across the Detroit river on ferry boats, where they were taken charge of by the companies over whose line they were to go; but that the terminus of the defendants

was still at Windsor. It was also shewn that the business of the defendants could not be conducted on so small a space as lot 83, and that the buildings on lots 83 and 84 were used for freight.

Held, reversing the decree of SPRAGGE, C., that the terminus and depot were not confined to buildings alone, but extended to the whole premises necessary for conducting the business of a terminus, and that upon the true construction of the deed the plaintiff was only entitled to have lot 83 included in the terminus, and had no right to have all the buildings or any particular building on lot 83

Per PATTERSON, J.A.—That even if the deed were read as requiring the establishment of buildings on the lot in question, that duty had been sufficiently complied with by their erection. *Geauyeau v. Great Western R. W. Co.*, 412.

5. *R. W. Co.—Action by creditors against shareholder—Proof of defendant being a shareholder.*—Where a creditor of a company is proceeding by *scire facias* against a shareholder he must bring the defendant within the precise terms of the statute by shewing that he is in the strictest sense a shareholder.

In an action against defendant as a shareholder for unpaid stock, it appeared that the defendant signed the stock book, which was headed with an agreement by the subscribers to become shareholders of the stock for the amount set opposite their respective names, and upon allotment by the company "of my or our said respective shares" they covenanted to pay the company ten per cent. of the amount of said shares and all future calls. The directors subsequently passed a resolution direct-

ing the secretary to issue allotment certificates for each shareholder for the shares held by him. The secretary accordingly prepared such certificates, which certified to the subscriber that the company in accordance with his application for — shares * * had allotted to him — shares amounting to —. The certificates were delivered to the company's broker to deliver to the shareholders. There was no evidence to shew any formal notification to the defendant of the above resolution, or that a certificate of allotment had been issued; and he never paid the ten per cent. He, however, admitted that he had received notices asking for payment, and that he supposed the first notice he received was for the ten per cent. The evidence shewed that he did not consider that he was entitled to any notice, and that he based his belief that he was not a shareholder simply on the ground that he had not paid the ten per cent.

Held, affirming the judgment of the Queen's Bench, 43 U. C. R. 22, that the evidence was sufficient to prove that knowledge of the acceptance of his offer by the company had reached the defendant and that he was therefore liable as a shareholder.

Held, also, that it was not *ultra vires* of the directors to take defendant's subscription for stock without at the same time receiving payment of the ten per cent. thereon. *Denison v. Lesslie*, 536.

6. *R. W. Co.*—*Covenant to erect and maintain a station—Specific performance.*—In consideration of a bonus granted by the plaintiffs, the Wellington, Grey, and Bruce R. W. Co. covenanted "to erect and maintain a permanent freight and passen-

ger station" at G. Shortly afterwards the road was leased, with notice of this agreement, to the defendants, who discontinued G. as a regular station, merely stopping there when there were any passengers to be let down or taken up.

Held, affirming the decree of SPRAGGE, C., 25 Gr. 86, that the mere erection of station buildings was not a fulfilment of the covenant, and that the municipality was entitled to have it specifically performed.

The decree, which enjoined the defendants from allowing any of their ordinary freight, accommodation, express, or mail trains, other than special trains, to pass without stopping for the purpose of taking up and setting down passengers, was varied by limiting it to such trains as are usually stopped at ordinary stations. *The Corporation of the Township of Wallace v. The Great Western R. W. Co.*, 44.

REFORMATION.

Of deed.—See DEED.

RENEWAL.

Of Chattel mortgage.—See CHATTEL MORTGAGE.

ROAD ALLOWANCE.

Right to original allowance.—See WAYS, 1.

SALE OF GOODS.

Sale of goods—Warranty—Statute of Frauds.—The plaintiff sued the

defendant for a breach of warranty of a hay press, which he had agreed to purchase from him if it should be capable of pressing into bales 10 tons of hay per day, which, as he alleged, the defendant warranted it would do. The machine was delivered to the plaintiff, but upon trial failed to do the stated amount of work, and was returned. The defendant denied the warranty, and gave evidence to shew that the sale was only a conditional one. At the close of the plaintiff's case a nonsuit was moved for, on the ground that an action would not lie on the warranty as there had been no sale, and that the Statute of Frauds was a bar. Leave was reserved to move on the whole case. These objections were renewed at the close of the case, and it was afterwards arranged that the questions to be submitted to the jury should be, whether a guarantee was given by the defendant that the machine would do the above amount of work, and was broken, and the damages. The jury found a verdict for the plaintiff.

Held, affirming the judgment of the C. P. 28 C. P. 202, that the verdict was amply supported by the evidence, set out in the case, as to the guarantee.

Semble, that the arrangement entered into at the trial precluded the defendant from objecting that no action would lie on the warranty, because there was no sale; but that it did not apply to the objection founded on the Statute of Frauds, which, however, did not affect the plaintiff's right of action, for that it was not necessary for such a warranty to be in writing. *Northwood v. Rennie*, 37.

See LANDLORD AND TENANT — PARTNERSHIP.

SECURITY.

Right to.]—See INSOLVENCY, 3.

Collateral.]—See APPROPRIATION OF PAYMENTS.

SEPARATE ESTATE.

See MARRIED WOMAN, 2, 3.

SHAREHOLDER.

Action by judgment creditor against.]—See RAILWAYS AND RAILWAY COMPANIES, 5.

In public company, liability for calls]—See PUBLIC COMPANY.

SHIPPING RECEIPTS.

Fraudulent—*Issued by station agent*—*Liability of company for.*]—See RAILWAYS AND RAILWAY COMPANIES, 3.

SPECIFIC PERFORMANCE.

Specific performance—*Improvements*—*Lien for*—36 Vic. ch. 22, O.—*Statute of Limitations.*]—The bill was filed to enforce specific performance of an agreement to sell certain land, made by one R., since deceased. The original agreement was cancelled, and on the 22nd of May, 1866, another agreement for sale, contained in a lease of the land from R. to the plaintiff, was substituted therefor. In November of 1865, when the original agreement was entered into, R., who held two mortgages on the land in question, thought he had obtained an absolute title thereto, by proceedings in a foreclosure suit on these mortgages. It afterwards, however, appeared that

long prior to the first of the mortgages held by R., the mortgagor, T. H. had, by a voluntary deed, conveyed 50 acres of the land to his son, E. H. Subsequently, to the first mortgage to R., but prior to the second mortgage, E. H. mortgaged the 50 acres to one A. E. H. was not made a party to the foreclosure suit, but A. was served with notice of the proceedings in the Master's office, and not having appeared, he and the mortgagor were declared foreclosed. Soon after the above agreement for sale in September, 1866, R. filed a bill against T. H., E. H., and A., for the foreclosure of his two mortgages against all these defendants, when a decree was made declaring the deed to E. H. to be void against R., and that A.'s mortgage was subject to the first mortgage, but had priority over the second mortgage held by R., and he was directed to pay into Court a certain sum as the price of redemption, which payment was made at the appointed time. It appeared that the plaintiff had actual notice of E. H.'s outstanding equity of redemption before he made any improvements; and that he made them in reliance upon R. holding him harmless.

Held, affirming the decree of PROUDFOOT, V.C., that the plaintiff was not entitled to a decree for specific performance against the representatives of R., as they had no power to convey, nor against A., because there was no privity between him and the plaintiff, and no equity to make him bound by the agreement.

Held, also, that the plaintiff was not entitled to a lien on the land for his improvements.

Held, also, that the plaintiff had not acquired any rights by virtue of

the Statute of Limitations, inasmuch as his possession was that of a tenant and was not exclusive of the mortgagor. *Russell v. Romanes*, 635.

*Of agreement to erect station.]—*See RAILWAY AND RAILWAY COMPANIES, 6.

STATEMENT.

See CHATTEL MORTGAGE.

SURETY.

*Discharge of.]—*See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.

TERMINUS.

*Of railway.]—*See RAILWAYS AND RAILWAY COMPANIES, 4.

TROVER.

*Trover—Evidence of conversion of goods — Asportation — Subsequent offer.]—*The plaintiff, at Guelph, sold to B. & Co. at Ottawa, 65 barrels of pork, and shipped it by the Great Western R. W. Co., the shipping receipt acknowledging the receipt of the same addressed to the plaintiff's order at Prescott, and to notify B. & Co. at Ottawa. The pork was carried by the Great Western Railway and steamer "Passport" to Prescott, her manifest shewing a delivery there into the defendants' charge, and stating that the plaintiff was owner, and that B. & Co. were to be notified. B. & Co. were large dealers in Ottawa, and all goods for them, or in which they appeared interested, were, by arrangement with the defendants,

sent on to Ottawa. This pork was accordingly sent on and inspected by B. & C., who refused to accept it. The plaintiff, who was fully aware of all that had occurred, and that the pork was at Ottawa, swore that he demanded the pork from the defendants' agent at Prescott; but there was no evidence of a refusal, and it appeared that the plaintiff at the same time requested the agent to try and get B. & Co to accept it. Before the action was brought, the defendants offered the plaintiff his pork at Prescott.

Held, affirming the judgment of the Common Pleas, 29 C. P. 102, that the asportation of the pork to Ottawa did not constitute a conversion.

Held, also, that there was not sufficient evidence of a demand and refusal, but, *Seemle*, that if there had been, trover could not be maintained after the subsequent offer to give up the pork. *Gauhan v. The St. Lawrence and Ottawa R. W. Co.*, 392.

See WAREHOUSE RECEIPTS.

TRUST.

See DEED.

VERDICT.

Entry of, by Court under R. S. O. c. 50, sec. 287.]—See DAMAGES.

Power of Court to enter.]—See INSURANCE, 2.

WAREHOUSE RECEIPTS.

Warehouse receipts—34 Vic. ch. 5, D.—*Trover*—*Right of property*—*Fraudulent preference.*]—At the re-

quest of the Consolidated Bank, to whom the Canada Car Company owed a large sum of money, the plaintiff consented to act as warehousemen to the Company for the purpose of storing certain car wheels and pig iron, so that they could obtain warehouse receipts upon which to raise money. The company granted him a lease for a year of a portion of their premises, upon which the wheels and iron were situate, in consideration of \$5. The Consolidated Bank then gave him a written guarantee that the goods should be forthcoming whenever required, and he thereupon issued a warehouse receipt to the company for the property, which they endorsed to the Standard Bank and obtained an advance thereon, which they paid to the Consolidated Bank.

Shortly afterwards, an attachment in insolvency issued against the company, and the defendants as their assignees in insolvency, took possession of the goods covered by the receipts.

It appeared that the plaintiff was a warehouseman carrying on business in another part of the city: that he only acquired the lease for the purpose of giving warehouse receipts to enable the company to obtain an advance from the Consolidated Bank; and that he had not seen the property himself, but had merely sent his foreman to examine it before giving the receipt. The plaintiff being sued in trespass and trover:

Held, affirming the judgment of the Queen's Bench, 43 U. C. R. 78, that he was not entitled to recover; that he had neither possession of nor property in the goods in question; and that he was not a warehouseman of the goods within the meaning of 34 Vic. ch. 5, D.

Quere, if the receipt had been valid, as given by a warehouseman in the ordinary course of business, whether the transaction, as set out in the evidence, could be considered as fraudulent within the Insolvent Act.

Semble, that to sustain this view certain inferences of fact must be drawn, which had not been found at the trial.

Quere, also, whether, under the facts more fully set out in the report, the two banks were so identified that the transaction must be regarded as an attempt to secure an antecedent debt from the Consolidated Bank by means of a warehouse receipt. *Milloy v. Kerr et al.*, 350.

This case has been argued before the Supreme Court, and stands for judgment.

WARRANTY.

See INSURANCE, 2, 3—SALE OF GOODS.

WAYS.

1. *Highway — Right to original allowance*—50 Geo. III. ch. 1, 4 Geo. IV. ch. 10—*Municipal Acts — Construction of.*—The plaintiff claimed in right of his wife, under a deed to her, dated 7th October, 1867, of the south half of lot 9 in the 5th concession of Haldimand, to be entitled to the original allowance for road between lots 8 and 9, by reason of the justices of the Quarter Sessions having in 1837 laid out a road across this south half in lieu, as was claimed, of the original allowance. In proof thereof the report of the then surveyor was produced, dated 15th July, 1837, addressed to the justices, reciting the petition of twelve freeholders for the new road, with his

certificate of his having examined and surveyed it and given notice according to law; the road to be 50 feet wide. He also certified as to his having examined the original allowance and found it impracticable by reason of bad hills and swamps, while the new road was good. On the back of the report was endorsed the minute of the Quarter Sessions thereupon, namely, "Read and opposed, and confirmed this 18th July, 1837," which, with the user, &c., of the road as a highway, was the only evidence of their action in the matter. In March, 1866, a by-law was passed opening up this allowance, and the owner of lot 9 then moved his fence to the limit of the allowance. In November, 1875, a by-law was passed repealing the previous by-law, but without expressing it to be for the purpose of closing up this road allowance. At the time the road was laid out the Quarter Sessions had no power to sell an original road allowance or convey it to the person whose land was taken in compensation; and they could only alter a road on condition that the new or substituted road should be of not less width than the one for which it was substituted, while in ordering a new road they had a discretion to lay it out of any width between 40 and 60 feet. The original road allowance in question was 60 feet, while the new road was 40 feet.

Held, affirming the judgment of the Common Pleas, 27 C. P. 475, that the plaintiff acquired no right to the original allowance under 50 Geo. III. ch. 1, and 4 Geo. IV. ch. 10, under which the land was laid out; nor under 20 Vic. ch. 69, or the subsequent Municipal Acts identical therewith.

Per BURTON, J.A., that even if sec. 426 of 36 Vic. ch. 48, O., was

retrospective, it only applied to new roads which had been opened in substitution for or in lieu of the original road allowance, and not to the case of a wholly new road, which the evidence proved this to be.

Per HARRISON, C.J.O., assuming, without deciding, that sec. 426 is retrospective, and that the plaintiffs were entitled thereunder to the original allowance, they could not succeed in this action for want of a conveyance thereof from the corporation.

Per HARRISON, C.J.O.—The words “may convey,” in the above section, are compulsory; and the corporation cannot refuse a conveyance to a person entitled to it. *Cameron et ux. v. Wait*, 175.

This case has been argued before the Supreme Court, and stands for judgment.

2. *By-law—Closing up road—Ingress and egress—Injurious affected—Compensation.*—*Held*, reversing

the judgment of the Common Pleas, 29 C. P. 216, that sec. 504 of R. S. O. ch. 174—providing that no council shall close up any public road, “whereby any person will be excluded from ingress and egress to and from his lands or place of residence over such road, unless the council, in addition to compensation, also provides for the use of such person some other convenient road or way of access to the said lands or residence”—only applies to cases where the only means or convenient means of access is over the road closed up, and not where there is already another existing way of access, though a less convenient one.

It is not a condition precedent under sec. 504 that compensation should be provided for in the by-law closing up the road. *In re McArthur and the Corporation of the Township of Southwold*, 295.

See MUNICIPAL CORPORATIONS—JURISDICTION, 2.

